

84-6190

Office - Supreme Court, U S

FILED

OCT 17 1984

ALEXANDER & STEVAS
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

No.

CHARLES F. McLAUGHLIN, Petitioner,

v.

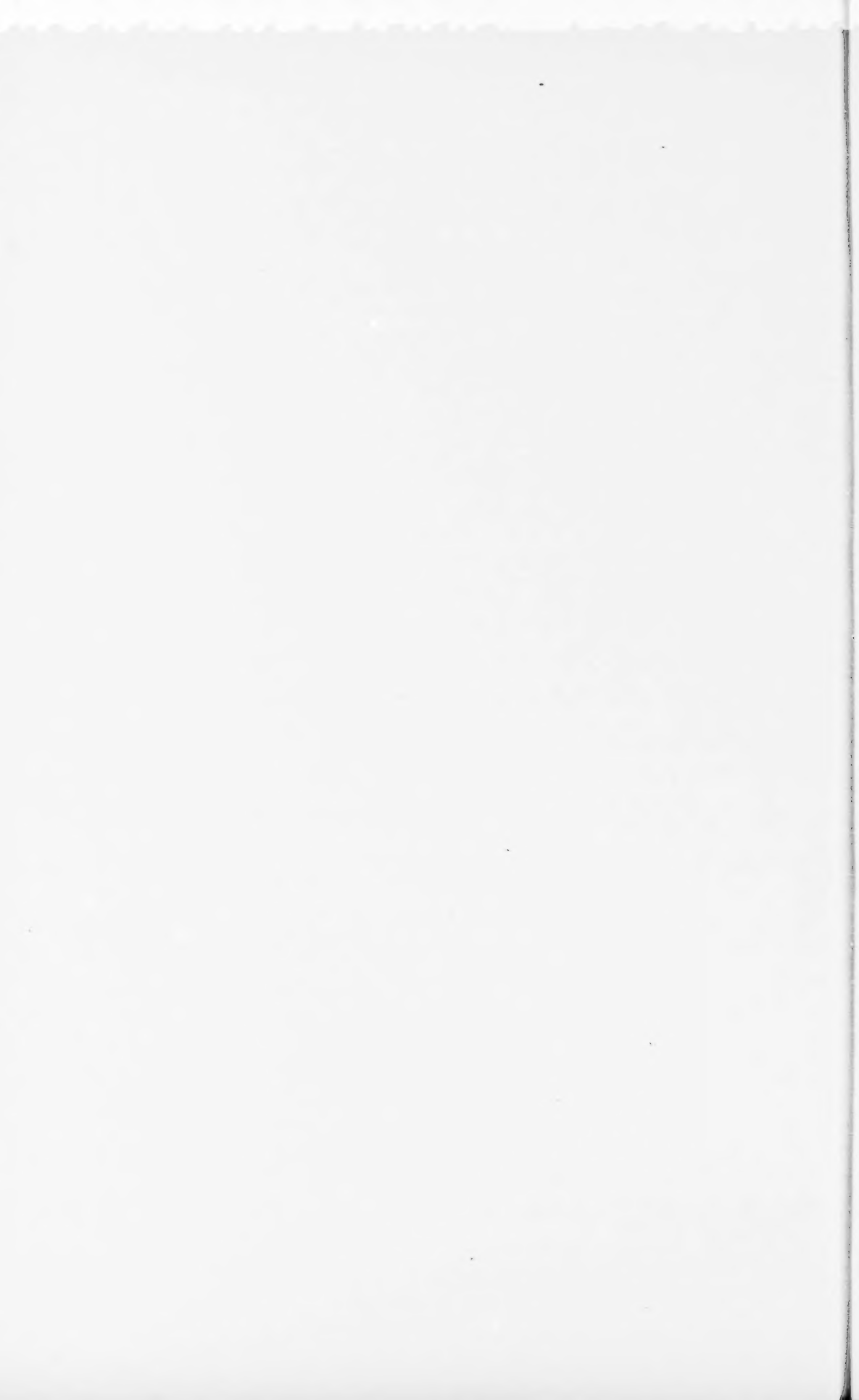
OFFICE OF PERSONNEL MANAGEMENT,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CHARLES F. McLAUGHLIN
622 E. Allegheny Ave
Philadelphia, Pa. 19134
Telephone: (215) 423-6920

Pro Se
No Counsel

84-6190



QUESTIONS PRESENTED

1. Whether the construction of Public Law 93-136 by the Office of Personnel Management conflicted with the language of the statute, the will of Congress, and the legislative history of the statute, and, in effect, contravened the purposes of the statute.
2. Whether any provision of Public Law 93-136 required or permitted the Office of Personnel Management to pay to an individual covered under the U. S. Civil Service Retirement Act who retired shortly after an annuity cost-of-living increase date an annuity that was less than the annuity that would have been payable to him if he had retired on the date immediately preceding the increase.
3. Whether the U. S. Court of Appeals for the Federal Circuit erred in its

Opinion of June 1, 1984, as modified in its Order of July 26, 1984, on Appeal No. 84-904, in stating that "...OPM gave petitioner the annuity he would have received if he had retired immediately before the last increase (on March 1, 1980) because that was larger than the annuity he would receive on his actual retirement date of August 31, 1980."

4. Whether the U. S. Court of Appeals for the Federal Circuit has jurisdiction under 5 U.S.C. Section 7703 to review decisions of the Merit Systems Protection Board concerning initial annuities awarded to employees in voluntary retirements under the U. S. Civil Service Retirement Act.



TABLE OF CONTENTS

	<u>Page</u>
QUESTIONS PRESENTED	1
TABLE OF CONTENTS	111
TABLE OF AUTHORITIES	111
OPINION BELOW	1
JURISDICTION	2
STATUTORY PROVISION INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	37
CONCLUSION	49
APPENDIX	

TABLE OF AUTHORITIES

STATUTES

28 U.S.C. Section 1254(1)	2
Public Law 93-136, codified in 5 U.S.C. Section 8340(c)(1) (1976 ed.)	3
5 U.S.C. Section 8339	5



STATUTES	
	<u>Page</u>
Public Law 89-205 (79 Stat. 840)	8
Public Law 96-499 (94 Stat. 2605)	11
5 U.S.C. Section 7703	21
CASE	
Lindahl v. Office of Personnel Management, 718 F.2d 391	47
CONGRESSIONAL REPORTS	
Senate Report No. 93-456	12
House of Representatives Report No. 93-457	12
MISCELLANEOUS	
OPM Federal Personnel Manual, Supplement 831-1, Instruction 30, February 29, 1980.	6
OPM Federal Personnel Manual, Supplement 831-1, Subchapter S14	5
5 C.F.R. Section 1201.115	28



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

No.

CHARLES F. McLAUGHLIN, Petitioner,
v.

OFFICE OF PERSONNEL MANAGEMENT,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Petitioner prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Federal Circuit, entered in this proceeding on June 1, 1984 and modified in Order on July 26, 1984 upon denial of rehearing.

OPINION BELOW

The opinion of the Court of Appeals is not reported, and is reproduced as

Appendix B to this petition. The decision of the Merit Systems Protection Board is not reported and is reproduced as Appendix D to this petition.

JURISDICTION

The judgment of the Court of Appeals for the Federal Circuit was entered on June 1, 1984 (reproduced as Appendix F to this petition), affirming decision of the Merit Systems Protection Board dated June 15, 1983 (reproduced as Appendix D to this petition). A timely petition for rehearing was denied by the Court of Appeals in Order dated July 26, 1984 (reproduced as Appendix C to this petition), which modified its opinion issued June 1, 1984 to a certain extent.

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISION INVOLVED

Public Law 93-136, 87 Stat. 490, codified at 5 U.S.C. Section 8340(c)(1), 1976 edit., reproduced as Appendix A to this petition, provides in pertinent part:

...An annuity (except a deferred annuity...)...which...has a commencing date after the effective date of the then last preceding annuity increase...shall not be less than the annuity which would have been payable if the commencing date of such annuity had been the effective date of the then last preceding annuity increase...

STATEMENT OF THE CASE

INTRODUCTION.

This is a civil action by a retired employee of the U. S. Postal Service against the Office of Personnel Manage-

ment (OPM) for awarding him a smaller U. S. civil service annuity than it would have awarded him if he had retired six months earlier with a commencing date of the annuity being the same as the effective date of the then preceding annuity cost-of-living increase.

Petitioner is seeking an upward adjustment of his annuity so that it will accord with the provisions of Public Law 93-136, which states that an annuity (except a deferred annuity) "shall not be less than the annuity which would have been payable if the commencing date of such annuity had been the effective date of the then last preceding annuity increase..."

Respondent OPM argued in the court below in "Respondent's Opposition to Petition for Rehearing" that the annuity it awarded petitioner is in keeping with a "look back" provision in Public Law

93-136. Petitioner contends that there is no "look back" provision in Public Law 93-136 nor in its legislative history that permitted, required, or limited OPM to compute annuities in the manner it did and to pay smaller annuities for later retirement in petitioner's case and in that of several tens of thousands of other retirements.

This petition and the decisions of the court below and the Merit Systems Protection Board cannot be properly understood without an understanding of basic annuity computations under the U. S. Civil Service Retirement Act. See 5 U.S.C. Section 8339, Computation of Annuity; and OPM Federal Personnel Manual, Supplement 831-1, Subchapter S14, Computation of Annuities. Nor can it be properly understood without an understanding of the construction given to Public Law 93-136 by the Office of

Personnel Management, the U. S. agency charged with administering the U. S. civil service statutes. See OPM Federal Personnel Manual, Supplement 831-1, Instruction 30, Cost-of-living guarantee, February 29, 1980.

A brief account of basic annuity follows.

The amount of basic annuity depends primarily upon an employee's length of creditable service and "high-3" average pay. The "high-3" average pay is the highest pay obtainable by averaging the rates of basic pay in effect during any three consecutive years of service. Basic pay is the pay set by law or regulation. It does not include bonuses, overtime pay, military pay, special allowances, cash awards or other compensation given in addition to the basic pay.

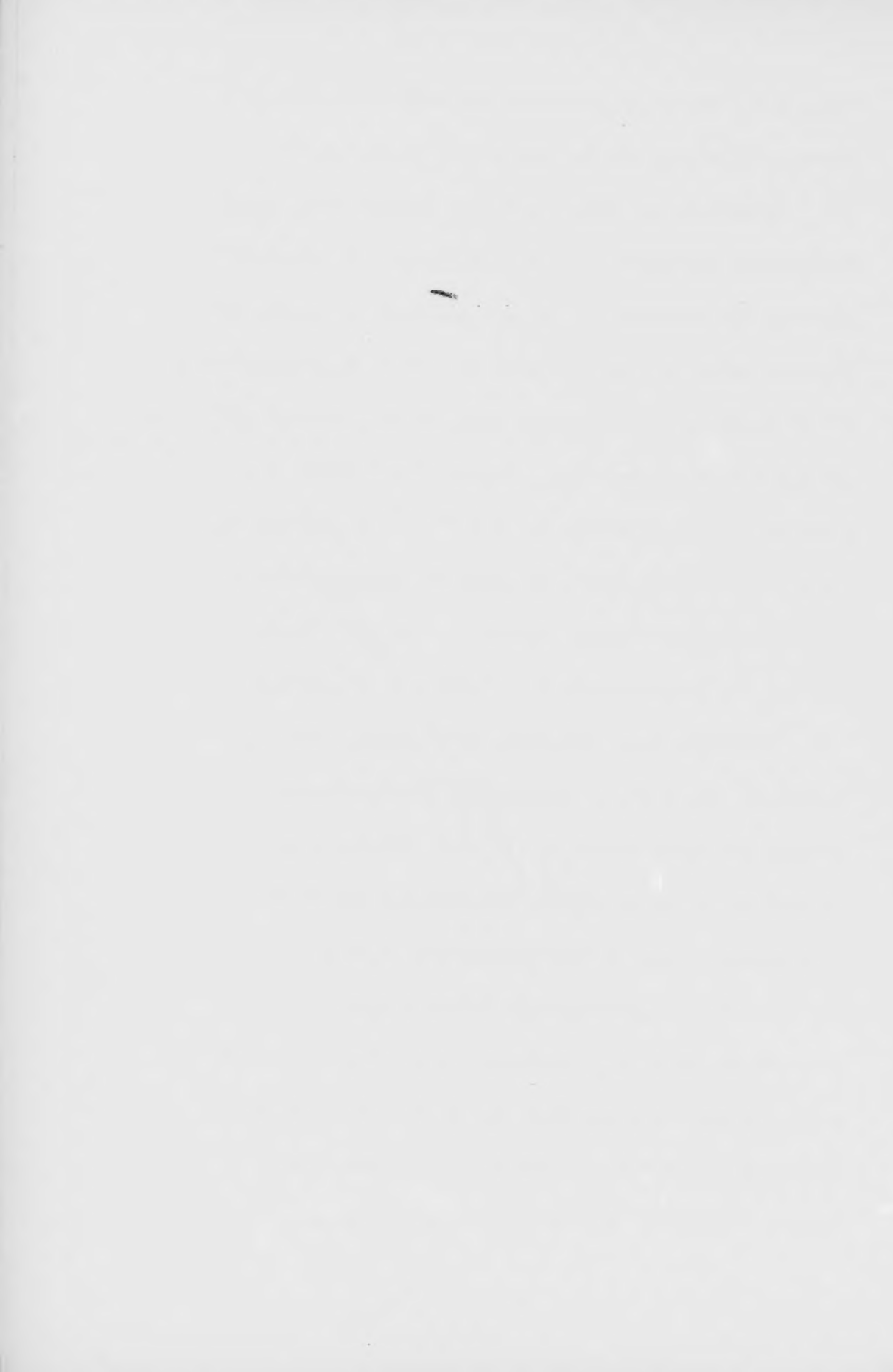
The general formula for obtaining the basic annuity in voluntary non-disability retirements is: (a) take 1 1/2 percent of the "high-3" average pay and multiply the result by years of service up to 5 years; (b) add 1 3/4 percent of the same "high-3" average pay multiplied by years of service up to 5 additional years; (c) add 2 percent of the same "high-3" average pay multiplied by all years of service over 10 years. The maximum basic annuity cannot exceed 80 percent of the "high-3" average pay, except that additional annuity credit for unused sick leave is allowable. The general formula is not used in certain cases of law enforcement officers, firefighters, and air traffic controllers.

The basic annuity is reduced under certain conditions. The only reduction relevant to this petition is an annuity reduced when retiring employee chooses an

"annuity with survivor benefit to named person having an insurable interest".

Annuities are periodically adjusted for cost-of-living increases. A cost-of-living increase is also called a cost-of-living adjustment (COLA). For the period 1978 through 1980 the following annuity COLAs were granted: March 1, 1978, 2.4 percent; September 1, 1978, 4.9 percent; March 1, 1979, 3.9 percent; September 1, 1979, 6.9 percent; March 1, 1980, 6.0 percent; September 1, 1980, 7.7 percent.

Public Law 89-205 (79 Stat. 840), enacted in 1965, provided that COLAs would be applicable to all annuities payable on the effective date of the increase. As a consequence, until 1973 there was a perceived advantage in retiring the day before the COLA became effective as opposed to retiring on the effective date or shortly thereafter. Large numbers of employees clustered



their retirements immediately prior to scheduled annuity increases.

The clustering of retirements just before an increase placed a serious burden on the operations of the retirement system as well as burdens on agencies who lost large number of retirees at the same time. To correct the problem, Public Law 93-136, an act to liberalize eligibility for cost-of-living increases in civil service annuities, was enacted on October 24, 1973, to apply only to annuities which commenced on or after July 2, 1973. One of the purposes of Public Law 93-136 was to guarantee retiring employees an annuity at least equal to what they would have received had they retired on the date immediately prior to the previous cost-of-living increase.

After Public Law 93-136 was enacted, the Civil Service Commission (later



renamed Office of Personnel Management), adopted a comparative annuity computation method that it believed would effectively comply with the provision in Public Law 93-136 that the annuity of an employee retiring on or after the effective date of an annuity cost-of-living increase shall not be less than the annuity which would have been payable had the employee retired the day before the increase.

OPM's comparative annuity computation method is given in OPM's Federal Personnel Manual, Supplement 831-1, Instruction 30, February 29, 1980. It reads:

Cost-of-living increase guarantee.

(1) A retiring employee entitled to an immediate annuity which begins after the effective date of a cost-of-living increase is guaranteed that the annuity granted will be no less than it would have been if it had commenced on the effective date of the increase, and that increase had been added to the annuity otherwise payable.

(2) In computing annuities for employees who retire after a cost-of-living increase has been granted,



a comparison must be made between:

- (a) The amount of actual annuity earned as of the day of separation, or the day pay ceases, if on that day the employee meets the service and age (or disability) requirements; and
- (b) The annuity which would have been payable based on total service and high-3 average pay that existed on the day before the last cost-of-living annuity increase became effective, plus the percentage of that cost-of-living increase.

The larger amount begins on the day following the employee's separation, or on the day after the employee's pay ceases...

OPM's comparative annuity computation method was discontinued with respect to annuities commencing after the 45th day after the enactment of Public Law 96-499; 94 Stat. 2605 (enacted December 5, 1980). Section 401 of that Act amended 5 U.S.C. Section 8340(c) by striking out paragraph (1) thereof and by inserting a new paragraph to provide for the proration of a retiree's initial annuity COLA.

Petitioner contends that OPM's comparative annuity computation method during the entire period it was in use was incomplete and defective and did not achieve the objectives for which Public Law 93-136 was enacted. The purposes of Public Law 93-136 were clearly expressed in Senate Report No. 93-456, 93rd Congress, 1st Session, and in House of Representatives Report No. 93-457, 93rd Congress, 1st Session, the reports which accompanied Bill H. R. 3799, the bill that was enacted into Public Law 93-136. The following excerpt from Senate Report No. 93-456, page 2, gives one of the purposes of Public Law 93-136:

...H. R. 3799 will correct an anomaly occasioned by the provisions of the present law, whereby an employee retiring after the effective date of a cost-of-living increase may receive a smaller annuity than an employee retiring just before the effective date of the increase, even though the former may have longer tenure or the same or higher high-three average salary.

Other excerpts from those reports are reproduced in Appendix G to this petition.

Petitioner contends that OPM contravened Public Law 93-136 through its comparative annuity computation method by producing annuities that were less than would have been payable if the commencing date of such annuities had been the effective date of the preceding annuity increase. Petitioner contends that OPM failed the test of correctly applying Public Law 93-136 in the majority of retirement cases. It failed whenever the rate of inflation between annuity cost-of-living increase dates, as measured by the Consumer Price Index, exceeded the rate of increase in employee's high-3 average salary between those dates plus the rate of increase in the years of service factor plus the product of those two rates. During



periods when those conditions did not prevail, OPM's comparative annuity computation method worked satisfactorily.

Petitioner contends that OPM could have complied in full with the requirements of Public Law 93-136 by using a comparative annuity computation method of the following type:

Computations are made comparing

(1) the amount of annuity earned
on the basis of total service
and high-3 average salary,
both as of the date of separation, with

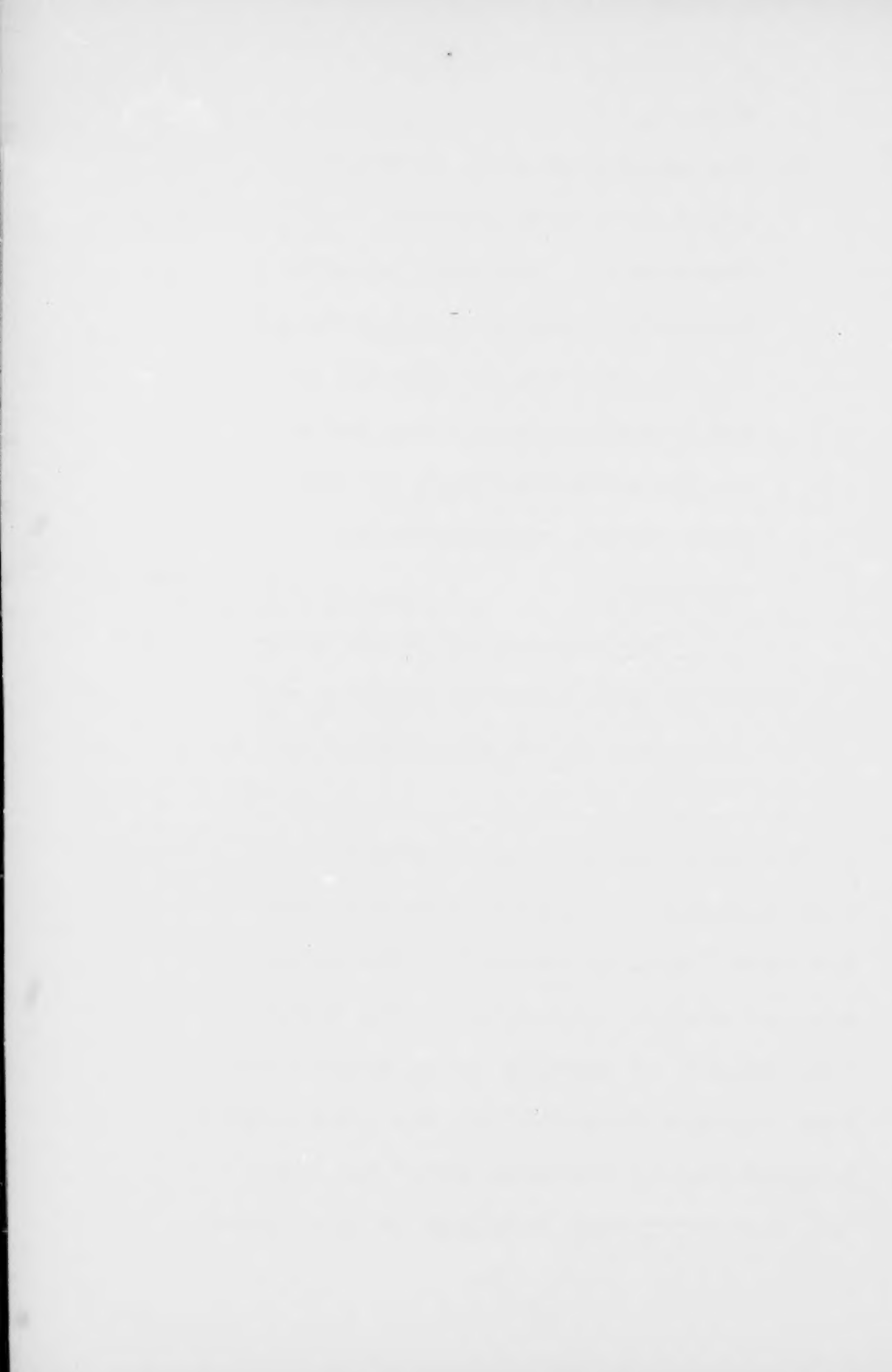
(2) the amount of annuity earned
on the basis of total service
and high-3 average salary,
both as of the day prior
to the effective date of the
most recent cost-of-living
increase, plus that increase

with

- (3) the amount of annuity which would have been payable (awarded) on the most recent cost-of-living increase date 1/ to the employee if separation had occurred on the day prior to the effective date of the most recent cost-of-living increase.

The highest of these annuities thus computed is used as the annuitant's basic annuity.

1/ The term "annuity which would have been payable" is distinguishable from the term "annuity earned". The terms are not always identical. The phrase "the amount of annuity which would have been payable (awarded) on the most recent cost-of-living increase date" includes the cost-of-living increase on that date.



PROCEDURAL HISTORY.

Petitioner separated on an immediate non-disability retirement from the United States Postal Service on August 31, 1980 with 41 years of creditable government service plus 9 months of unused sick leave creditable toward a U. S. civil service annuity.

OPM awarded petitioner an annuity computed on the basis of the annuity earned as of February 29, 1980. That annuity amounted to \$12,745.70 basic annuity (determined by multiplying \$16,185 high-3 average salary as of February 29, 1980 by the service factor for 41 years, 3 months creditable service as of February 29, 1980); reduced by 10 percent for benefit to survivor with insurable interest, increased by the 6.0 percent COLA effective March 1, 1980, and further increased by the

7.7 percent COLA effective September 1, 1980. On September 1, 1980, the commencing date of petitioner's annuity, the annuity payable amounted to \$1,091 per month.

Before awarding the annuity, OPM computed the amount of annuity earned as of petitioner's retirement date, August 31, 1980, reduced for the survivor benefit and increased by the 7.7 percent COLA effective September 1, 1980. That amount of annuity was less than the amount of annuity earned as of February 29, 1980, reduced for the survivor benefit and increased by the COLAs. OPM awarded the petitioner the larger amount, which, however, was less than the amount of annuity it would have awarded him if he had retired on February 29, 1980, with his annuity commencing as of March 1, 1980, the effective date of the preceding annuity

cost-of-living increase.

If petitioner had retired on February 29, 1980, OPM would have awarded petitioner an annuity amounting to \$12,162.40 basic annuity (determined by multiplying \$15,643 high-3 average salary as of August 31, 1979, by service factor for 40 years, 9 months creditable service as of August 31, 1979), reduced by 10 percent for benefit to survivor with insurable interest, increased by the 6.9 percent COLA effective September 1, 1979, and further increased by the 6.0 percent COLA effective March 1, 1980. On September 1, 1980, the annuity would have been increased by the 7.7 percent COLA effective that date. On September 1, 1980, the annuity would have amounted to \$1,114 per month.

Before OPM would have awarded that annuity, it would have compared it with the amount of annuity earned as of Febru-

ary 29, 1980, reduced by 10 percent for survivor benefit, increased by the March 1 COLA.

The annuity OPM awarded petitioner for retiring on August 31, 1980 amounted to \$23 per month less than the amount OPM would have awarded him if he had retired on February 29, with six months less service and a smaller high-3 average salary.

Petitioner requested OPM to reconsider the amount of his annuity and to award him an annuity in accordance with Public Law 93-136, an annuity that was not less than the annuity that was payable had he retired on February 29, 1980, with annuity commencing on March 1, 1980. OPM replied to petitioner's request in a letter dated October 19, 1982. It informed petitioner that he had not been paid less than if his annuity had begun on March 1, 1980, the effective date of the last annuity cost-of-living

increase preceding his retirement and that OPM's decision was now a final reconsideration decision. It informed him of his right to appeal the decision to the Merit Systems Protection Board (MSPB).

Petitioner filed a timely appeal with MSPB on November 5, 1982.

Petitioner waived an oral hearing.

MSPB sustained OPM's final reconsideration decision in Initial Decision No. PH08318310151 issued June 15, 1983.

Petitioner filed a timely petition with the Office of the Secretary, MSPB, Washington, D. C., for a review of MSPB's decision.

The Secretary, MSPB, denied the petition for review in Order dated January 10, 1984 (reproduced as Appendix E to this petition). In that Order, the Secretary notified petitioner of



his right under 5 U.S.C. Section 7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit.

Petitioner filed a timely petition with the Court of Appeals for judicial review of MSPB's decision.

The Court of Appeals affirmed MSPB's decision. It denied petitioner's petition for rehearing. It issued its judgment as a mandate, August 9, 1984.

MERIT SYSTEMS PROTECTION BOARD'S DECISION.

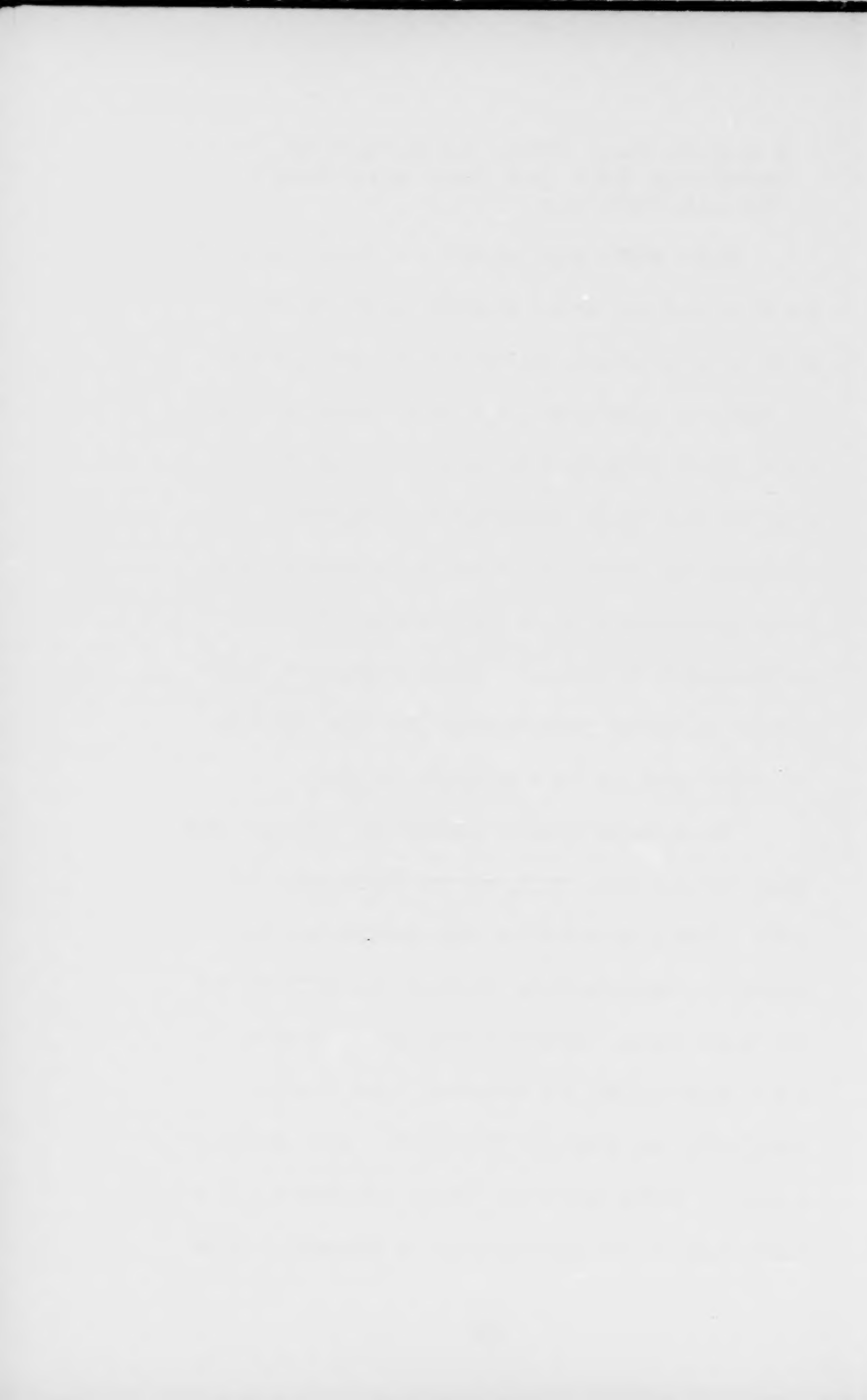
Under the heading "Analysis and Findings" in its initial decision, MSPB stated:

The record in this case indicates that appellant retired on August 31, 1980...The effective date of his retirement annuity was September 1, 1980. In this appeal, appellant challenges the method selected by OPM for calculating the amount of that annuity, arguing that under the provisions of a 1973 1/ amendment to the annuity statute,

5 U.S.C. Sec. 8340, he should be receiving \$264 per year more than OPM allotted him.

That MSPB statement is true, but it is misleading when placed side by side with a statement in the next paragraph of MSPB's decision, an erroneous statement that petitioner was arguing "that due to the high annuity increases awarded in 1979, his annuity would have been greater with a September, 1979 retirement date..." That argument was never made by petitioner in his appeal to MSPB nor in his appeal to OPM.

What petitioner actually argued was that if he had retired on February 29, 1980, OPM, under its own comparative annuity computation method in effect as of that date, would have awarded him \$264 more than it awarded him for retiring on August 31, 1980, six months later. MSPB omitted that argument, the very heart of petitioner's appeal, from



its findings. Not only did MSPB omit an essential part of petitioner's argument, but it distorted the argument with an analysis suggesting that petitioner was asking OPM to compute his annuity as if he had retired prior to the second preceding annuity cost-of-living increase. Petitioner requested no such computation. In his letter of appeal to OPM, he requested OPM to compute his annuity as if he had retired on February 29, 1980, the day before the preceding annuity cost-of-living increase. Petitioner's argument as to the amount of his annuity was given in his letter of appeal to MSPB on November 5, 1982 and is reproduced here:

Under the OPM computation method, if I had retired on February 29, 1980, I would have been receiving a gross annuity of \$13,358.00 on September 1, 1980. Under the same method, by retiring six months later on August 31, 1980, I became entitled to a gross annuity of \$13,094 on September 1, 1980, or \$264 less than if I had

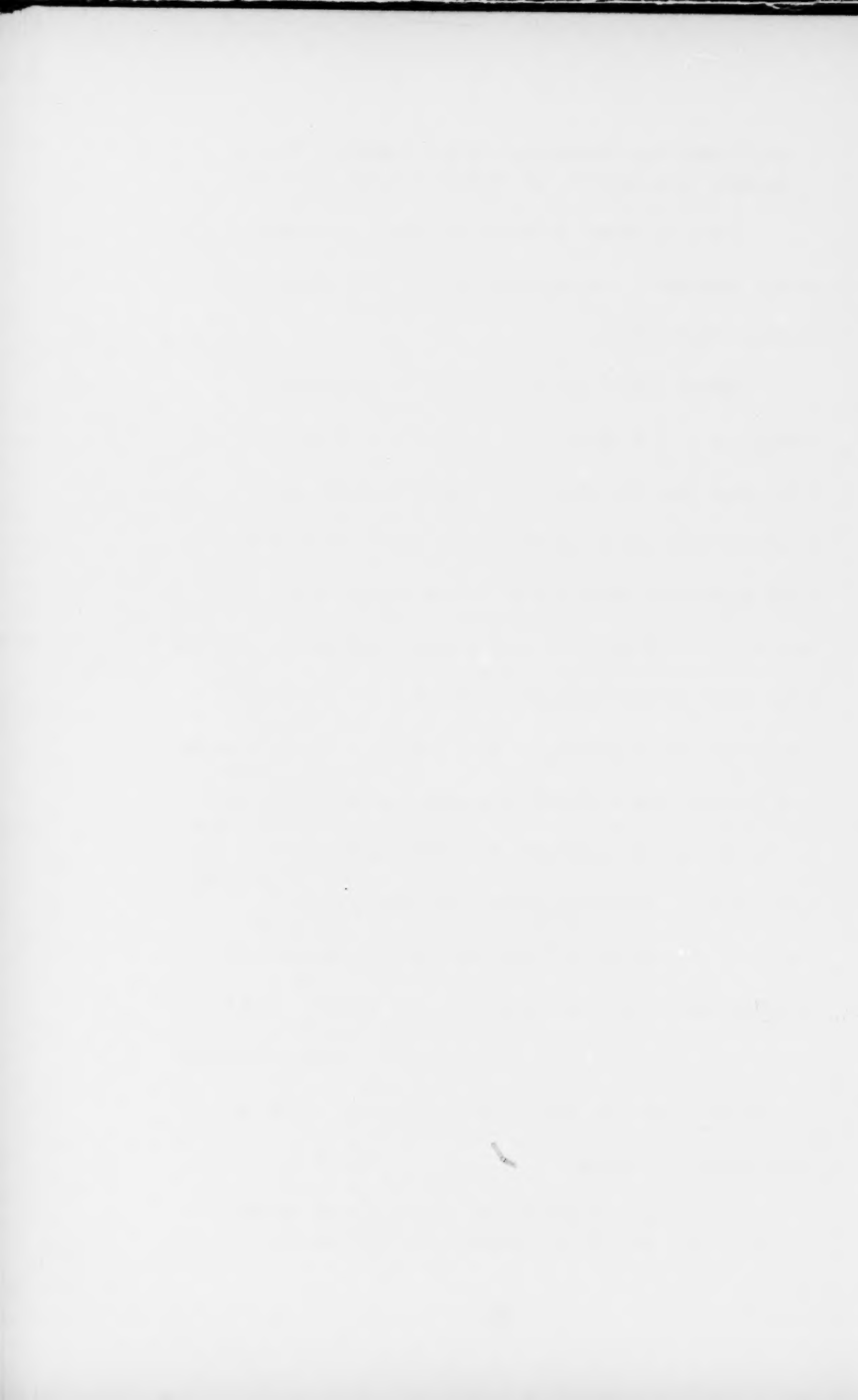


retired on February 29, 1980. That seems contrary to Public Law 93-136...

Petitioner preceded that argument with several paragraphs of the computations involved.

MSPB left petitioner's argument hanging. It did not report a finding of its own as to whether petitioner was correct in his assertion that the annuity OPM awarded was \$264 less than the annuity OPM would have awarded him, under its own computation method, if he had retired on February 29, 1980. Petitioner contends that MSPB should have reported a finding, inasmuch as OPM had stated in its final reconsideration decision letter (a copy of which petitioner had included with his appeal to MSPB) that petitioner had not been paid less, though it provided no substantiation. OPM's statement reads:

...you have not been paid less than if your annuity began on March 1,



1980, the effective date of the last annuity increase preceding your retirement. The legislation was designed in part to eliminate the anomaly of a difference in amount between annuities that commence before the effective date of a COLA and those that commence shortly after that date. The objective was achieved. Equity demanded that such annuities be no less than amounts paid others on the basis of the same, or even shorter, service.

MSPB left unresolved the conflicting claims of the petitioner and OPM as to the amount of annuity that would have been payable to the petitioner had he actually retired on February 29, 1980. The absence of an independent MSPB finding indicates that MSPB was less than thorough in its findings and decision.

Further evidence of MSPB's lack of thoroughness is the fact that its decision contains a number of errors of substance, several of which were incorporated in the Court of Appeals' opinion in this case.

MSPB attributed to the petitioner an argument he did not make:

Simply stated, appellant is arguing that Pub. L. 93-136 allows him to choose between two retirement dates, and that by electing the earlier date, March 1, 1980, his annuity rights must be calculated in all respects as if he retired on that date. Thus had he retired on that date, Pub. L. 93-136 would still apply and he would be allowed to choose between the actual date of retirement (now March 1, 1980) and the effective date of the annuity increase that preceded that date (September 30, 1979). He argues that due to the high annuity increases awarded in 1979, his annuity would have been greater with a September, 1979 retirement date than it was with a September, 1980 retirement date, despite the additional years of federal service.

None of the retirement dates in the above MSPB statement were ever given in argument by the petitioner. The statement shows a September 30, 1979 annuity increase date. The correct date is September 1, 1979.

Petitioner replied to the first sentence of that error-filled statement in his petition to the Secretary of the

Board, MSPB, Washington, D. C., for review of MSPB's Initial Decision. In that petition, petitioner disclaimed arguing that Public Law 93-136 allowed him to choose between two retirement dates. He stated that the law required that annuities be computed and determined by OPM in accordance with law, not by the annuitant. He suggested that the Board request OPM to furnish it with a detailed computation as to the amount of annuity he would have been receiving on September 1, 1980 if he had retired on February 29, 1980 and the amount of annuity he was entitled to on September 1, 1980 for retiring on August 31, 1980. Petitioner's suggestion was not taken up.

MSPB's Initial Decision concluded by sustaining OPM's final reconsideration decision as to petitioner's proper

retirement pay on the grounds that the legislative history of Public Law 93-136 supported OPM's interpretation of the statute, and on the grounds that great weight should be given to the frequent, consistent and long standing construction of a statute by an agency charged with its administration, and on the grounds that there was a "look back" provision in Public Law 93-136 permitting OPM to interpret Public Law 93-136 in the manner it did.

Petitioner petitioned the Board, MSPB, Washington, D. C., to review MSPB's Initial Decision. In that petition, petitioner challenged and refuted all the grounds on which MSPB based its decision.

The Board issued a brief Order dated January 10, 1984 denying petitioner a petition for review, stating that the petition did not meet the criteria set forth in 5 C.F.R. Sec. 1201.115.



COURT OF APPEALS' DECISION.

The Court's brief Opinion accompanying its Decision issued June 1, 1984 in petitioner's case contained a number of errors as to dates and other facts, especially an erroneous assertion that "...OPM gave the petitioner the annuity he would have received if he had retired immediately after the last increase (on March 1, 1980) because that was larger than the annuity he would receive on his actual retirement date of September 1, 1980."

In his petition to the Court for a rehearing in his case, petitioner called the Court's attention to those errors and stated that he believed that the Court picked up those errors from MSPB's Initial Decision in trust that they were facts. In an Order issued July 26, 1984 denying petitioner a rehearing, the Court modified its Opinion by correcting three



errors in dates. One of them was September 1, 1980 in the erroneous assertion quoted above. It substituted the correct date, August 31, 1980. It also substituted the word "before" for "after".

That assertion, despite the Court's corrections, remained erroneous, since the annuity OPM gave petitioner was not the annuity he would have received if he had retired immediately before the last increase.

The Court stated in its Opinion:

The bare language of the 1973 amendment is quite consistent with OPM's reading that only one "look back" was required, not a series of, or a continuum of successive "look backs".

Petitioner replied to that statement in his petition for a rehearing:

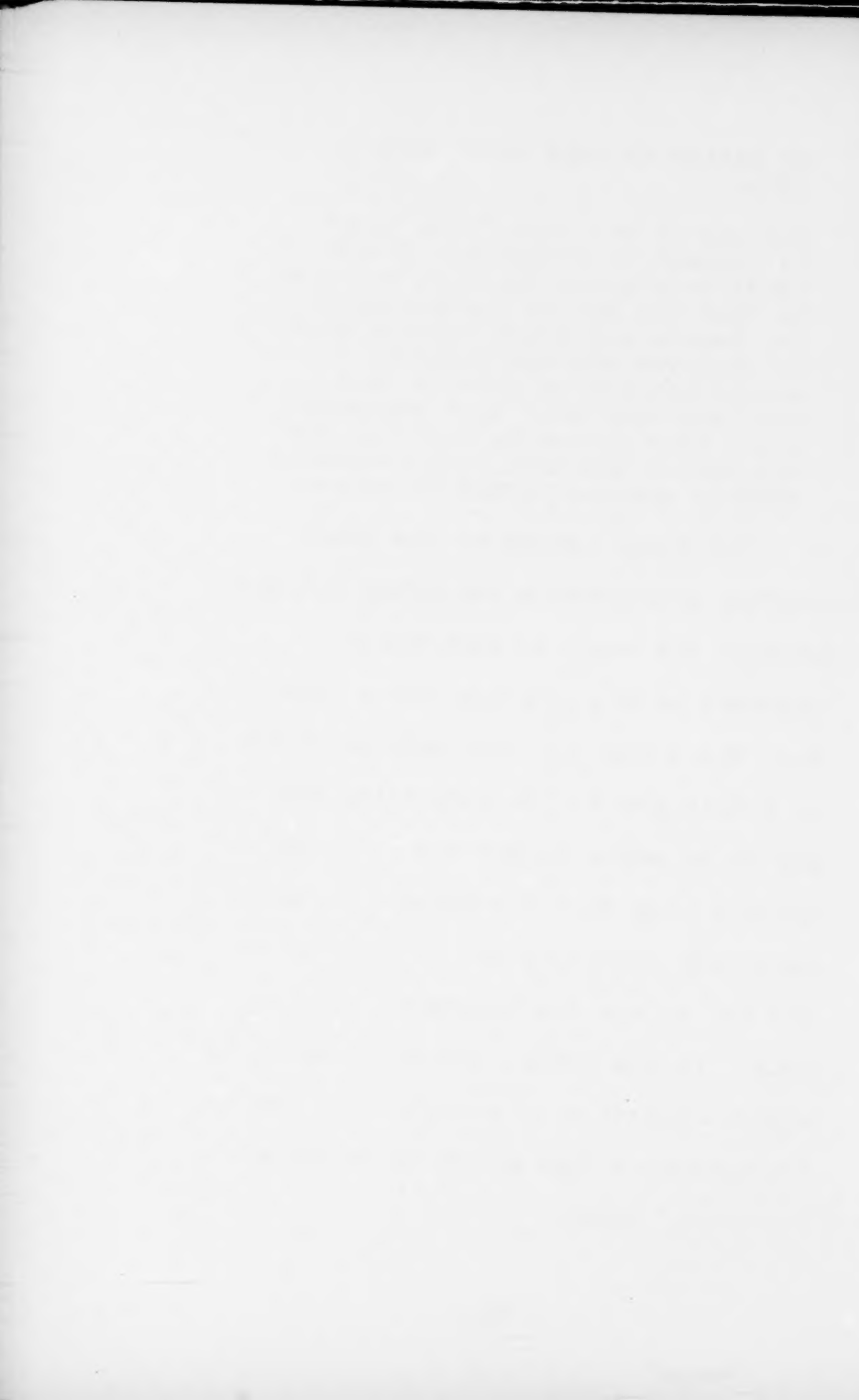
As a matter of fact, there is no use of the term "look back" in Public Law 93-136, nor in the Senate Report No. 93-456, nor in the House of Representatives Report No. 93-457, the reports that accompanied Bill H. R. 3799 that was enacted into Public Law 93-136. I urge the Court to review those documents and also



my letter to MSPB dated July 12, 1983.

The use of the term "look back" in respect to Public Law 93-136 tends to obscure the fact embodied in that law and in the accompanying Senate and House Reports that an employee who was retiring should not get an annuity that was less than what that employee would have gotten by retiring the day before the then last preceding annuity cost-of-living increase.

The Order issued by the Court denying petitioner a rehearing did not address the heart of petitioner's argument in his petition for a rehearing: that there was no look back provision in Public Law 93-136 permitting OPM to pay to an employee who was retiring an annuity less than the annuity he would have been receiving had he retired on the day before the preceding annuity COLA. In its Order, the Court accepted without question an assertion by OPM in "Respondent's Opposition to Petition for Rehearing" that:



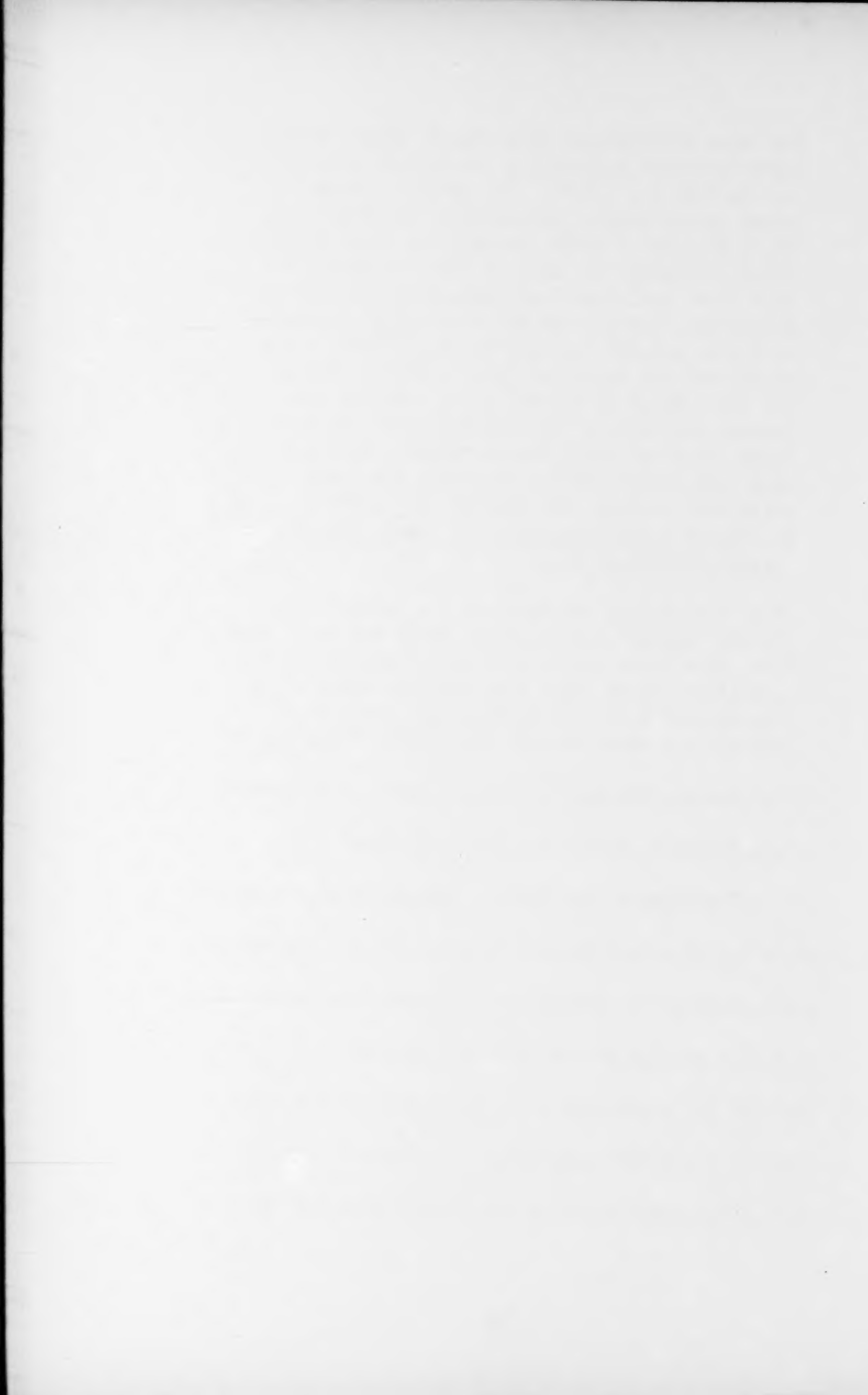
No one disputes the fact that had petitioner actually retired prior to March 1, 1980, he would have been entitled, pursuant to Pub. L. 93-136, to "look back" to the prior COLA period to chose the higher of the two calculated annuity amounts. However, petitioner did not actually retire prior to March 1, 1980. He retired on August 30, 1980. Thus, he was entitled only to chose between an annuity calculated based upon his actual retirement date and one calculated as though he had retired prior to March 1, 1980, without application of the "look back" provision.

...

The critical question is how the "look back" provision may be applied, not whether petitioner's annuity is smaller than one he would have received had he actually retired prior to the March 1, 1980 COLA.

(Emphases, misspellings, and incorrect retirement date as in original)

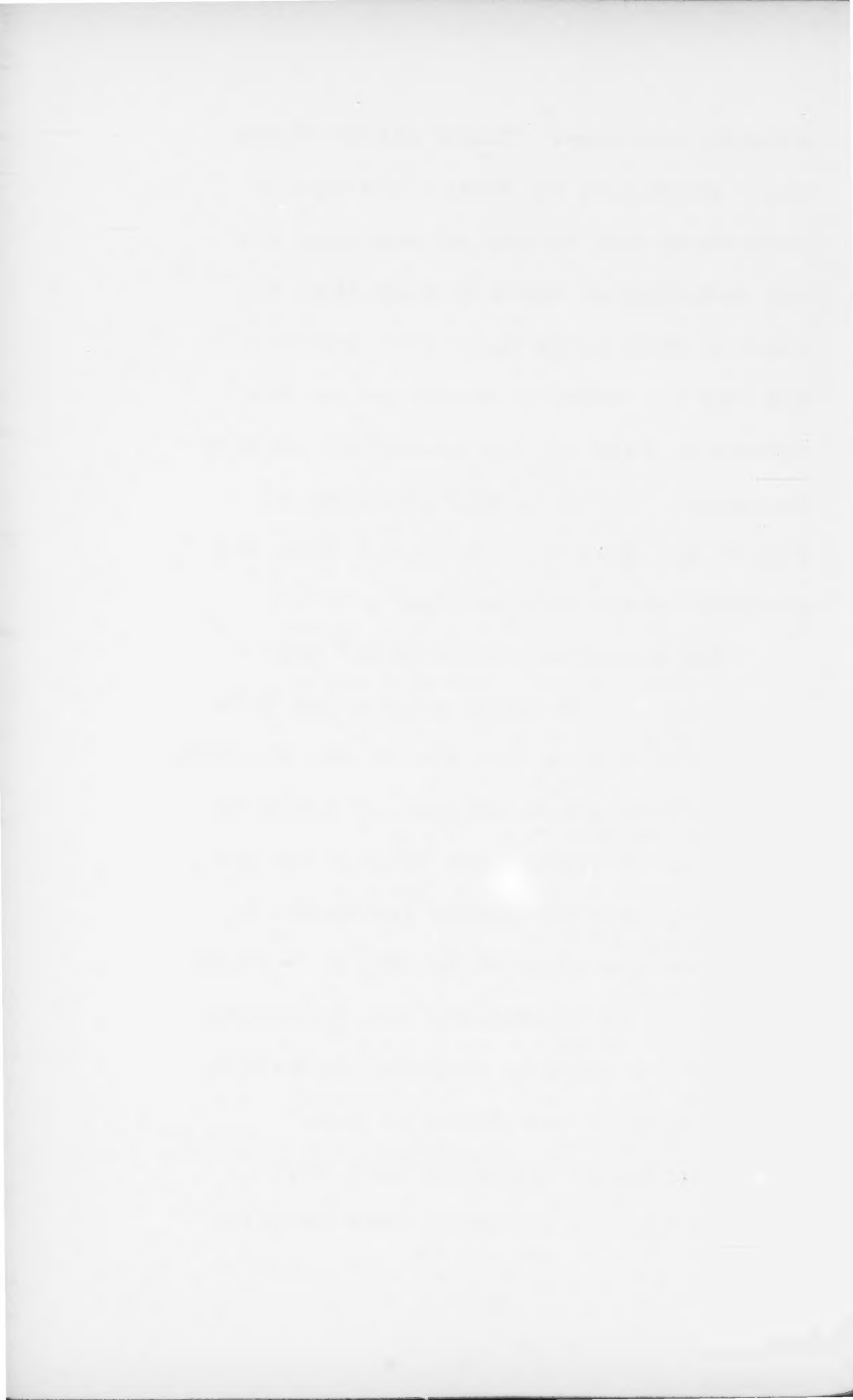
Contrary to OPM's assertion, quoted above, the critical question is whether petitioner's annuity is smaller than the one he would have received had he actually retired one day prior to the March 1, 1980 annuity increase, with annuity commencing on the date of the



annuity increase. There was no "look back" provision in Public Law 93-136 permitting OPM to pay an employee who was retiring an annuity less than the annuity that would have been payable to him had his annuity commenced on the effective date of the preceding annuity increase. In fact, the language of Public Law 93-136 is explicit that the annuity "shall not be less".

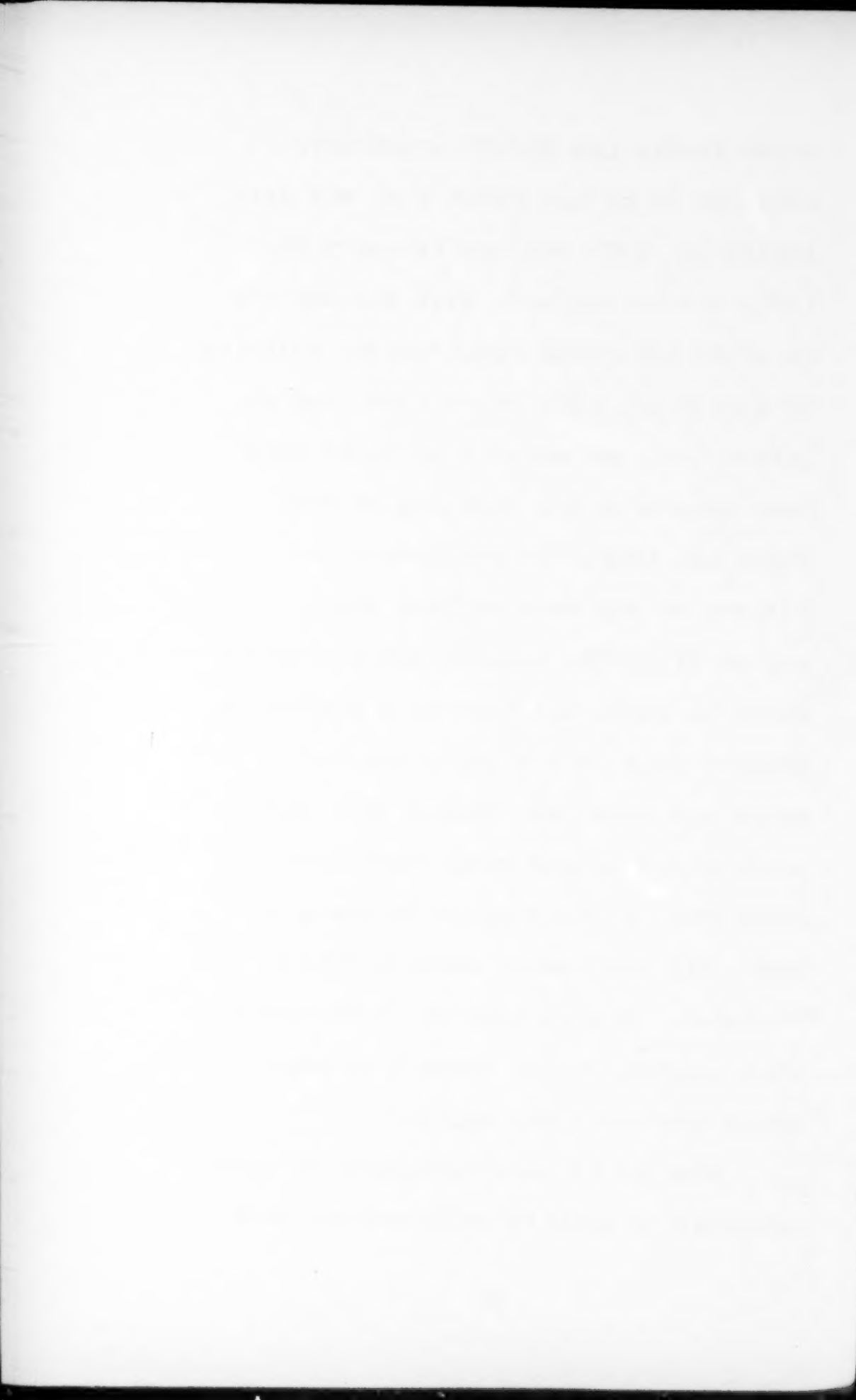
The so-called "look back" provision is a term which originated some time after Public Law 93-136 was enacted. It is a term which originally meant to look back or reach back to pick up the preceding cost-of-living increase, a term that was adopted by OPM to justify its use of an incomplete and defective comparative annuity computation method and to give it the force of law.

Petitioner contends that the largest annuity he could have received



under Public Law 93-136 would have occurred if he had retired on any date, August 31, 1979 through February 29, 1980, and he contends that the annuity he would have been receiving for retiring on August 31, 1979 would have been no larger than the annuity he would have been receiving for retiring on February 29, 1980. If petitioner had retired on any date earlier than August 31, 1979, back to and including March 1, 1979, the date of a preceding annuity COLA, the annuity awarded by OPM would not have been larger than the annuity petitioner would have been receiving by retiring on February 29, 1980, all applicable annuity COLAs included. A continuum of "look backs" that weighed in the Court's Opinion would therefore not apply.

Even if it were necessary to make comparative annuity computations back



to 1973 to comply with the language and intent of Public Law 93-136, the computations involved would not have been any great expense or trouble to OPM in this computer age.

In its Opinion, the Court stated:

It is clear that Congress has been aware of the OPM interpretation and no change has been made.

That statement by the Court that Congress had been aware of OPM's interpretation of Public Law 93-136 is an unsubstantiated assertion. No evidence was presented to the Court in this case nor was any evidence produced by the Court that Congress as a body had been aware during the period 1973-1979 of OPM's interpretation. Petitioner contends that Congress as a body had not been aware nor had OPM attempted during that period to make it aware of the fact that, under OPM's interpretation of Public Law 93-136, OPM was awarding smaller

annuities for later retirements, the shortfalls amounting to less than \$200 per year in most such retirement cases. Petitioner estimates that 50,000 employees and 200 Members who retired during that period suffered a financial loss in their annuities as a result of OPM's interpretation.

In its Opinion, the Court of Appeals touched upon a point of jurisdiction. Respondent OPM, in "Respondent's Informal Brief" and in "Respondent's Opposition to Petition for Rehearing" requested the Court to dismiss the case for lack of jurisdiction. The Court wrote into its Opinion that since it was affirming MSPB's decision on its merits, it need not consider the question of jurisdiction.



REASONS FOR GRANTING THE WRIT

1.

The Construction Of A Statute
By The Agency Charged With Its
Administration Which Is Plainly
Wrong And Contrary To The Clear
Language Of The Statute, Congress-
ional Intent And The Statute's
Legislative History Should Not
Have Been Accorded Deference
By The Court Below.

The Court of Appeals for the
Federal Circuit has decided an important
statutory question in this case in a way
in conflict with the principle establish-
ed in decisions by various courts below
that courts need not defer to admin-
istrative construction of a statute
which is inconsistent with statutory
language, congressional intent, and the
statute's legislative history.

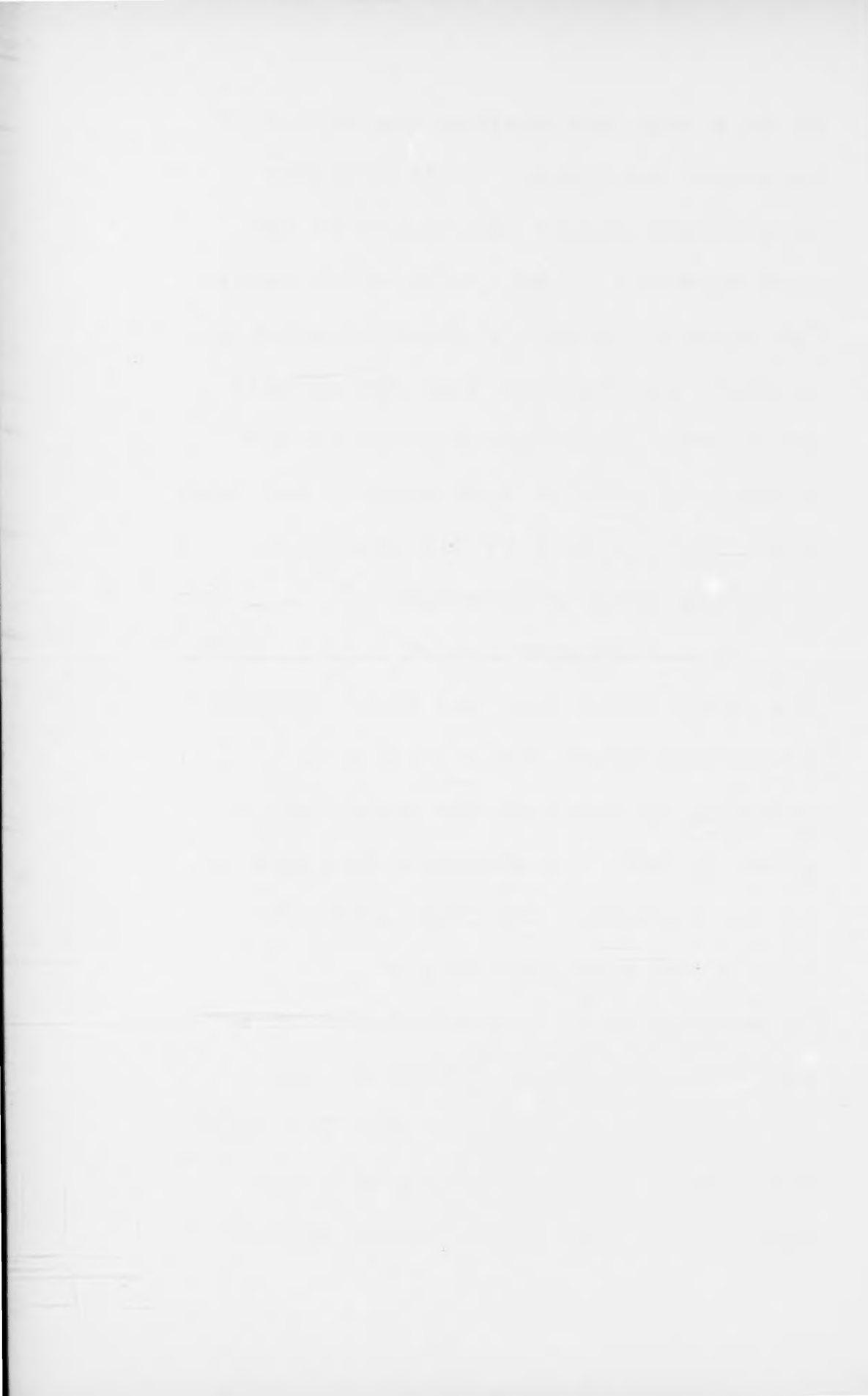
The question decided by the Court



in this case was whether the Office of Personnel Management (OPM) properly interpreted Public Law 93-136 in the part relevant to this case which reads: "An annuity (except a deferred annuity...) ...shall not be less than the annuity which would have been payable if the commencing date of such annuity had been the effective date of the then last preceding annuity increase..."

In its opinion issued June 1, 1984, the Court wrote that the Merit Systems Protection Board was justified in refusing to overturn the construction given by OPM, the administering agency, to the statute. The Court affirmed MSPB's decision upholding the determination of respondent OPM as to petitioner's proper retirement pay.

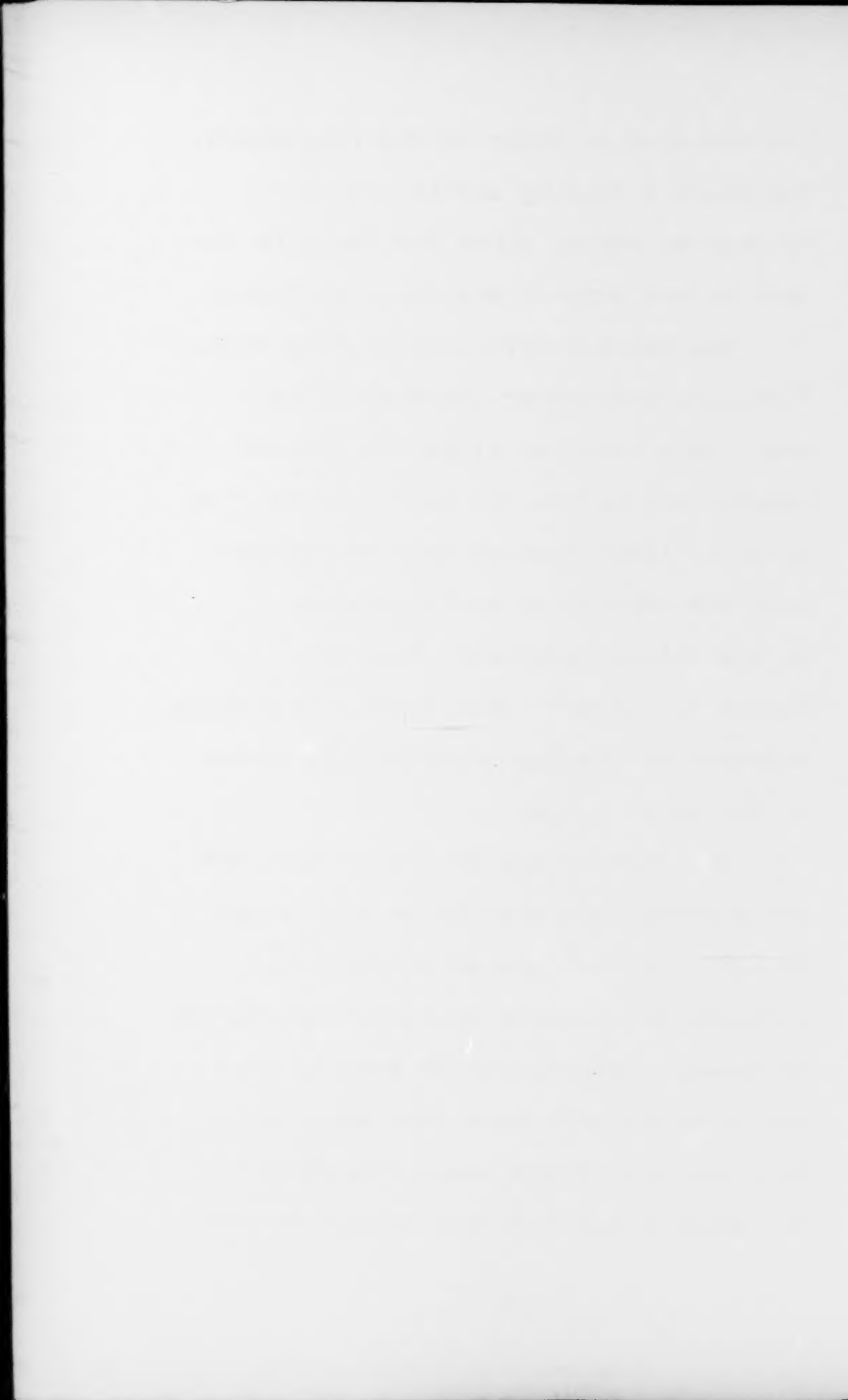
Petitioner contends that the Court wrote an erroneous finding into its opinion and that that finding colored



its decision in favor of the respondent. The Court's finding should not be allowed to stand, since the facts in the case do not support the Court's finding.

The Court's erroneous finding reads: "OPM gave petitioner the annuity he would have received if he had retired immediately before the last increase (on March 1, 1980) because that was larger than the annuity he would receive on his actual retirement date of August 31, 1980." That erroneous finding reflects on the decision-making process in the court below.

The fact of the matter is that OPM put a wrong construction on Public Law 93-136. It contravened the language, purpose, and history of Public Law 93-136 by awarding petitioner an annuity that was substantially less than would have been payable if the commencing date of the annuity had been the effective date



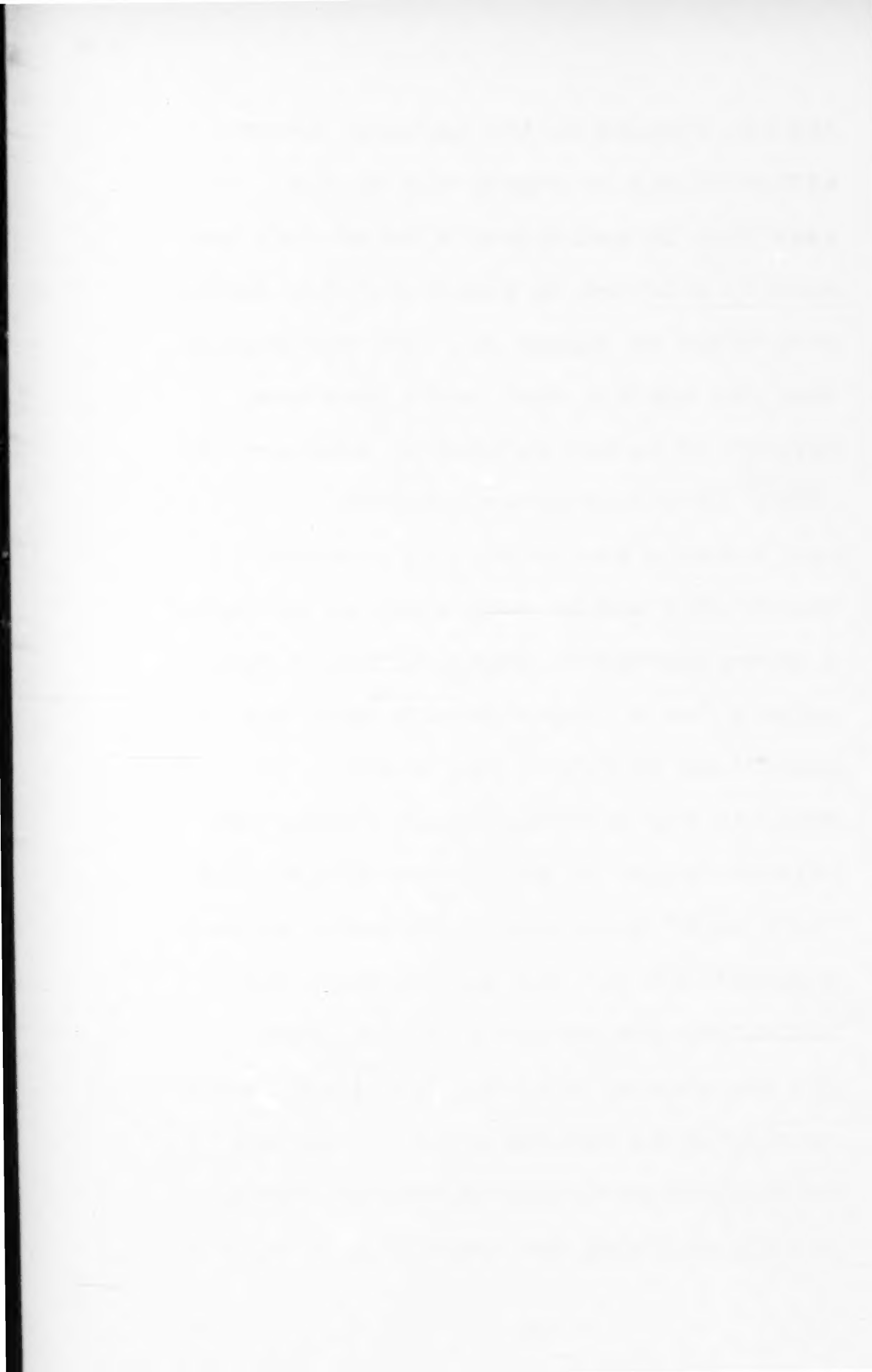
of the preceding annuity cost-of-living increase. Several tens of thousands of other employees who retired from government service during the period Public Law 93-136 was in effect were likewise awarded smaller annuities for later retirement by OPM.

The entire language of Public Law 93-136 is clear and unambiguous and should have posed no problem of interpretation or administration to OPM. The only correct interpretation of Public Law 93-136 is that an employee who is retiring shall get an annuity at least equal to what he would be receiving if he had retired the day before the effective date of the preceding annuity cost-of-living increase. The annuity could be more, but never less.

In the proceedings in the Court of Appeals, in which petitioner waived his right to an oral hearing, respondent OPM



did not respond in its informal brief affirmatively or negatively to the assertion in petitioner's brief that the annuity allotted to petitioner for taking retirement on August 31, 1980 was smaller than the annuity that would have been payable if he had retired on February 29, 1980. It did, however, restate petitioner's assertion. It restated it incorrectly and in such a way as to leave a strong impression that petitioner was arguing for a larger annuity than was guaranteed by Public Law 93-136. It wrote in its informal brief: "Under OPM's interpretation of Public Law 93-136 (the "look back" provision), OPM looks at two computations (1) the annuity that the individual has actually earned...and (2) the annuity that the individual would receive if he retired prior to the most recent cost-of-living-adjustment (COLA), thereby allowing the individual's annuity

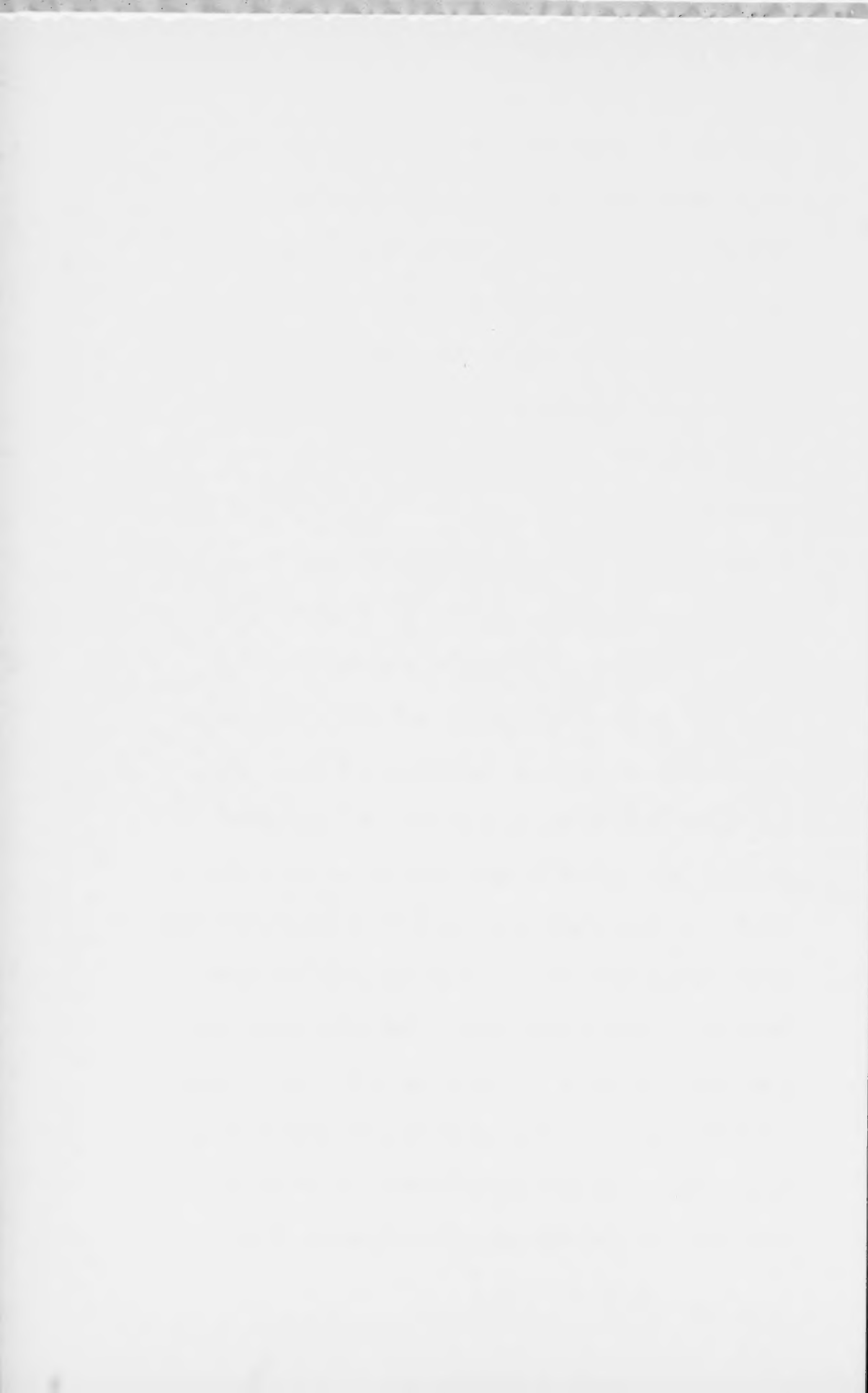


to be increased by the most recent COLA. The individual is then entitled to whichever of the two computations is higher. Petitioner asserts that OPM's interpretation is erroneous because in making the second computation, OPM does not "look back" again to see whether the inclusion of an additional previous COLA would further increase the petitioner's annuity." Contrary to that statement of the respondent, petitioner did not argue for the inclusion of an additional previous COLA to OPM's second computation. Petitioner did not argue for a larger annuity than was guaranteed by Public Law 93-136. He argued that the annuity OPM awarded him was smaller than the annuity it would have awarded him if he had retired on the day before the preceding annuity increase.

OPM attempted to justify its construction of Public Law 93-136 by



arguing throughout the proceedings in this case that Public Law 93-136 (which is no longer in effect) had a "look back" provision requiring it to compute annuities in the manner it did. Petitioner contends that no "look back" provision of the type invoked by OPM, stated or implied, permitting OPM to pay a smaller annuity for longer service, existed in the language of Public Law 93-136 nor in its legislative history. That no such provision existed can be ascertained from a reading of the statute and from a perusal of Senate Report No. 93-456 and House Report No. 93-457, the reports that accompanied the bill that was enacted into Public Law 93-136. The fact that OPM was able to get away with its version of Public Law 93-136 for so long without a contest in the courts until petitioner's case should not be construed as evidence of the



rightness of OPM's version. The legislative history of Public Law 93-136 is the proper determinant of the rightness or wrongness of OPM's version of Public Law 93-136.

It is an uncontestable fact that OPM's interpretation and application of Public Law 93-136 frustrated congressional objectives not only with respect to annuities payable to retirees but with respect to moderating the bunching of retirements around cost-of-living increase dates.

In a letter to petitioner dated October 27, 1980, Craig B. Pettibone, Director, Office of Pay and Benefits Policy, Compensation Group, U. S. Office of Personnel Management, wrote:

We have noted your additional arguments in your letter of September 15, 1980, about comparative annuity computations under the "look-back" provision, but we remain convinced that our interpretation of Public Law 93-136 is the proper one and in

keeping with the intent of Congress. We also believe that eliminating the lookback and prorating the first post-retirement increase are the best solution to the current bunching of retirements before each cost-of-living increase.

These changes would remove the financial incentive to retire just before an increase and insure that employees who work longer will always receive a greater annuity benefit...

Mr. Pettibone indicated in that letter that some employees had received smaller annuities for longer service and that bunching of retirements were occurring before annuity cost-of-living increases, a condition that Public Law 93-136 had been designed to correct, as detailed in Senate Report No. 93-456 and in H. R. Report No. 93-457. In short, Congress enacted Public Law 93-136 for the purpose of ensuring that an immediate annuity would not be less than it would have been if its commencing date had been the commencing date of the then



last preceding annuity cost-of-living increase and thus to moderate the bunching of retirements. OPM's interpretation of Public Law 93-136 frustrated the purpose for which Congress designed it.

It is abundantly clear from the facts of this case that the Court of Appeals erred in rendering a decision that deferred to OPM's construction of Public Law 93-136, a construction plainly wrong and contrary to the clear language of the statute, congressional intent, and the legislative history of the statute.

2.

The Decision Below Presents An Important Jurisdictional Question, Which Has Not Been, But Should Be, Resolved By This Court.

The Court of Appeals wrote in its opinion:

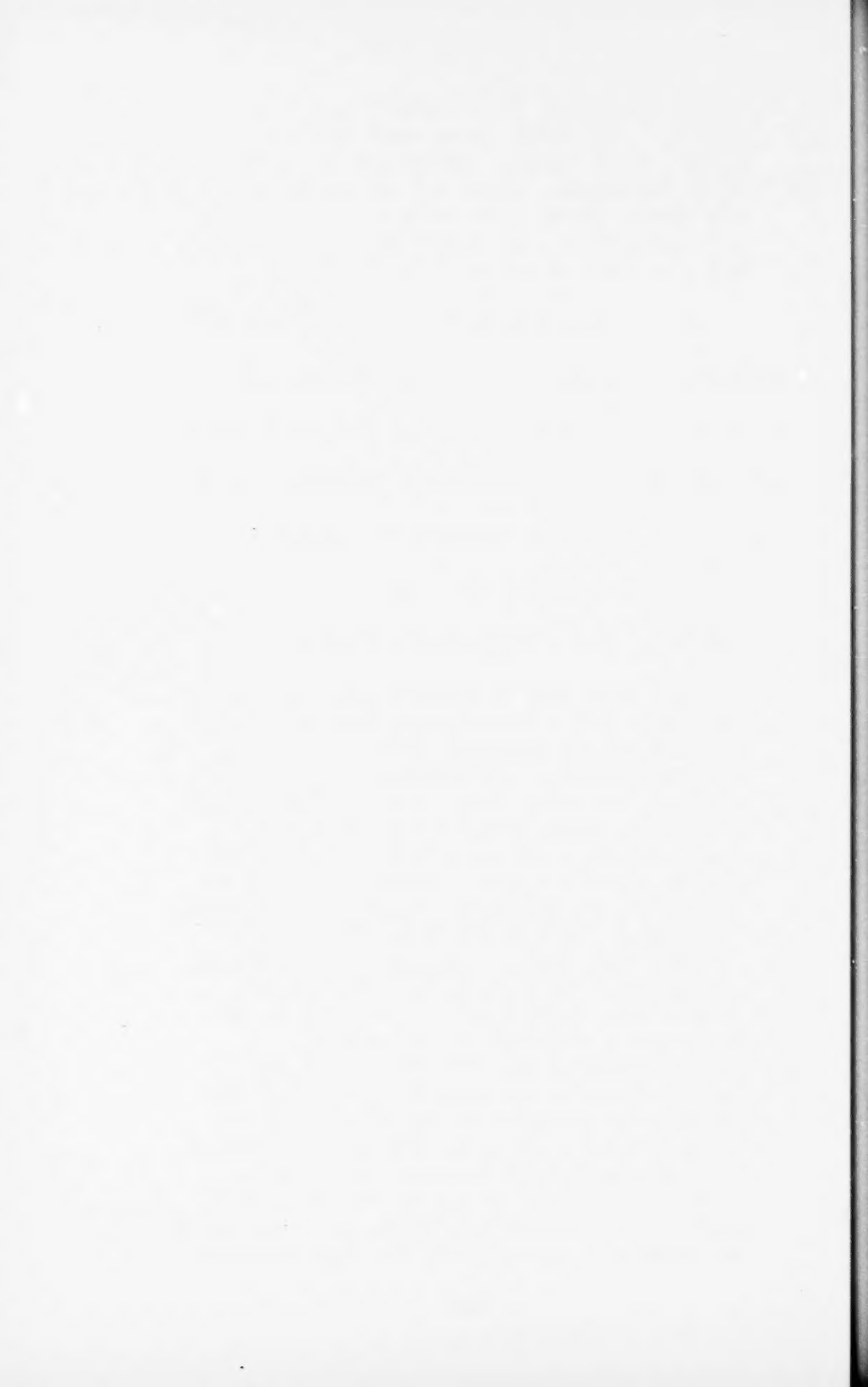
There is a dispute whether this court has any jurisdiction to review the Board's decision denying Mr. McLaughlin

the increased retirement annuity he seeks. We need not, and do not, consider that legal question in this case because, even if we assume arguendo that the court does have jurisdiction, we must affirm the MSPB's decision on its merits.

In "Respondent's Informal Brief" and in "Respondent's Opposition To Petition For Rehearing", the respondent argued that petitioner's appeal in the Court of Appeals should be dismissed for lack of jurisdiction. In the latter document, the respondent wrote:

Should the Court grant petitioner's request for rehearing, his appeal should be dismissed for lack of jurisdiction. Respondent has thoroughly briefed the issue of whether 5 U.S.C. Sec. 7703 provides the court with jurisdiction to review civil service retirement claims in Lindhahl v. Office of Personnel Management, 718 F.2d 391 (Fed. Cir. 1983) (en banc) petition for cert. granted, 52 U.S.L.W. 3906 (U.S. June 18, 1984) (No. 83-5954). 8/

We have attached portions of respondent's motion to dismiss petitioner's appeal in Lindhahl and hereby incorporate those pages in this brief...The Court acknowledged in its decision herein that a jurisdictional dispute exists but did not address it because respondent so clearly prevailed on the merits...



The Lindahl appeal referred to by the respondent involves an annuity based on a voluntary claim for disability and is in a different category of appeal from that of the petitioner, whose appeal involves an annuity based on optional retirement involving no claim for disability.

Inasmuch as upwards of 50,000 retirement involving no claim for disability occur yearly, it would be opportune for the Court to settle the question of jurisdiction in voluntary non-disability retirements by granting a writ of certiorari in this case and issuing a decision on the question of jurisdiction.



CONCLUSION

For the reasons stated above, the
Petition for Writ of Certiorari should be
granted.

Respectfully submitted,

CHARLES F. McLAUGHLIN
622 E. Allegheny Ave.
Philadelphia, Pa. 19134
Tel: (215) 423-6920

By: CHARLES F. McLAUGHLIN
Pro Se
No Counsel

October 1984

APPENDIX

Public Law 93-136	App. A
Decision of the Court of Appeals for the Federal Circuit	App. B
Order of the Court of Appeals for the Federal Circuit	App. C
Initial Decision of the Merit Systems Protection Board	App. D
Order of the Merit Systems Protection Board	App. E
Judgment of the Court of Appeals for the Federal Circuit	App. F
Excerpts from Senate Report No. 93-456 and H. R. Report No. 93-457	App. G



AN ACT

To liberalize eligibility for cost-of-living increases in civil service retirement annuities.

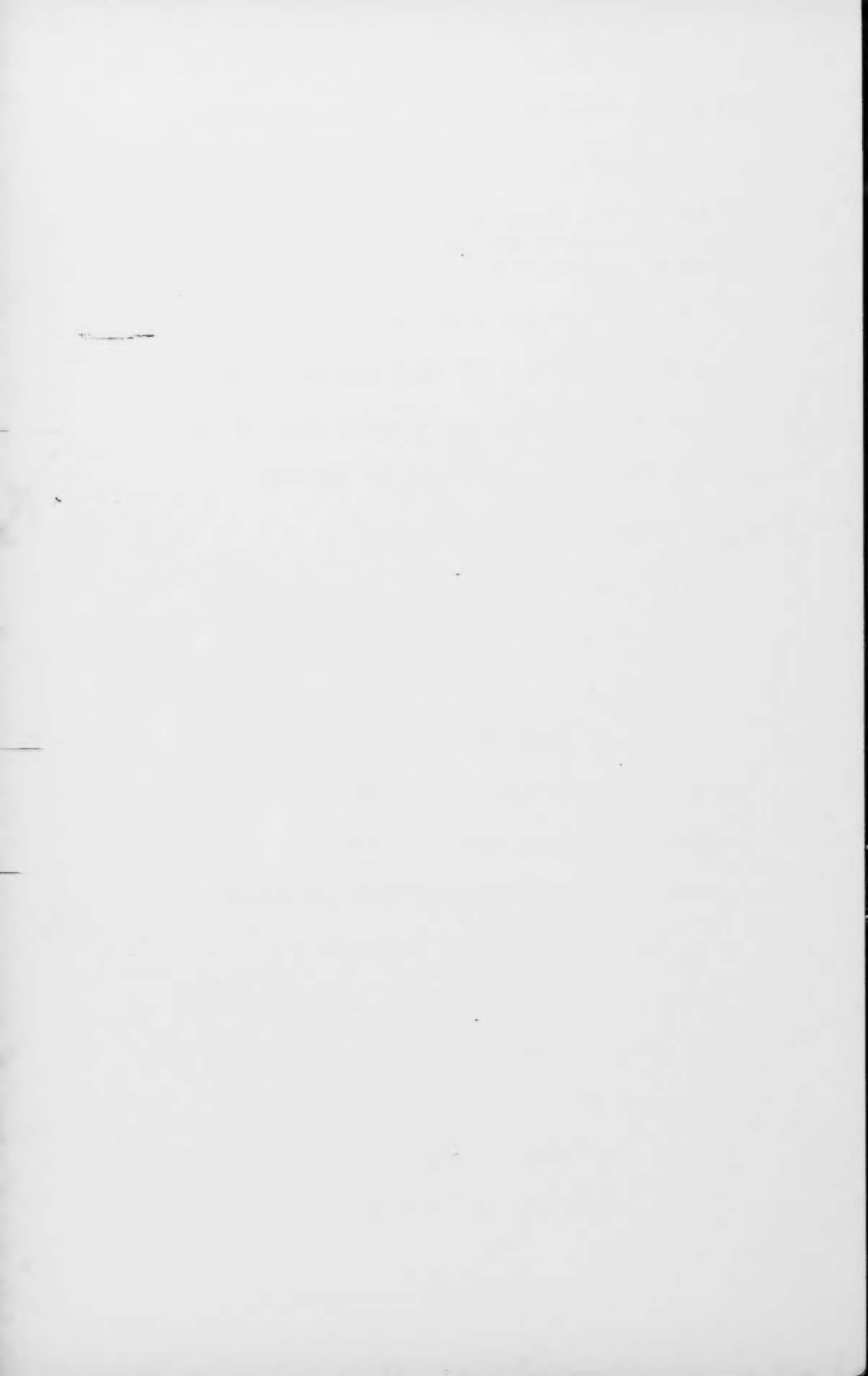
Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 8340(c) of title 5, United States Code, is amended --

(1) by renumbering paragraphs (1) and (2) thereof as paragraphs (2) and (3), respectively; and

(2) by inserting immediately above paragraph (2) (renumbered as such by paragraph (1) of this section), the following new paragraph:

"(1) An annuity (except a deferred annuity under section 8338 of this title or any other provision of law) which --

"(A) is payable from the Fund to an employee or Member



who retires, or to the widow or widower of a deceased employee or Member; and

"(B) has a commencing date after the effective date of the then last preceding annuity increase under subsection (b) of this section:

shall not be less than the annuity which would have been payable if the commencing date of such annuity had been the effective date of the then last preceding annuity increase under subsection (b) of this section. In the administration of this paragraph, an employee or a deceased employee shall be deemed, for the purposes of section 8339(n) of this title, to have to his credit, on the effective date of the then last preceding annuity increase under subsection (b) of this section, a number of days of unused sick



leave to his credit on the date of his separation from the service".

SEC. 2. The amendments made by this Act shall apply only with respect to annuities which commence on or after July 2, 1973.

Approved October 24, 1973.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
717 MADISON PLACE, N. W.
WASHINGTON, D. C. 20439

June 1, 1984

GEORGE E. HUTCHINSON TELEPHONE 633-6550
CLERK AREA CODE 202

Mr. Charles F. McLaughlin, Pro Se
622 E. Allegheny Avenue
Philadelphia, PA 19134

Mr. David M. Cohen, Director
Commercial Litigation Branch
Civil Division, Todd Bldg.
Department of Justice
Washington, D.C. 20530

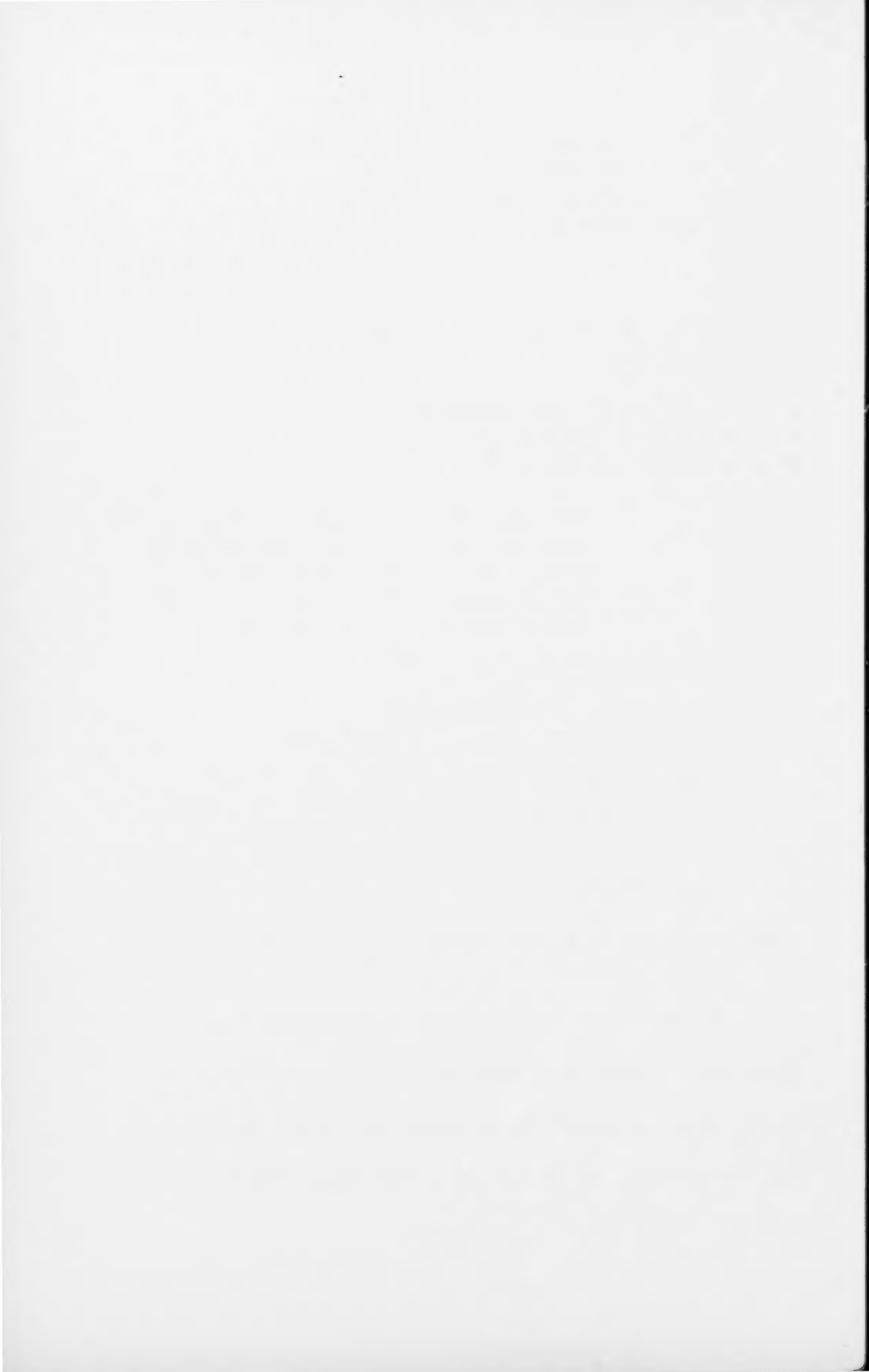
MEMORANDUM

RE: Appeal No. 84-904
 Charles F. McLaughlin vs. OPM

The Court today announced its
decision in the above-entitled appeal.

A copy of the Court's opinion is
enclosed, and a judgment in conformity
with the opinion has been entered today
as required by Rule 36, Federal Rules of

App. B



Appellate Procedure.

Costs may be recovered (by Appellant
or Appellee) as provided by Rule 39,
Federal Rules of Appellate Procedure.

Very truly yours,

George E. Hutchinson, Clerk

Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

United States Court of Appeals
for the Federal Circuit

CHARLES F. McLAUGHLIN,)

Petitioner.)

v.)

OFFICE OF PERSONNEL
MANAGEMENT,)

Respondent.)

Appeal No.
84-904

DECIDED: June 1, 1984

Before DAVIS, Circuit Judge, SKELTON,
Senior Circuit Judge, and MILLER,
Circuit Judge.

DAVIS, Circuit Judge.

DECISION

The decision of the Merit Systems Protection Board (MSPB or Board), upholding the determination of respondent Office of Personnel Management (OPM) as to petitioner's proper retirement pay, is affirmed.



OPINION

Petitioner retired on August 31, 1980, after more than 40 years of creditable federal service; the effective date of his civil service retirement annuity was September 1, 1980. OPM calculated this annuity so that it would not be less than his annuity if it had been calculated on the basis of the last preceding annuity increase which had occurred on March 1, 1980. OPM took that position because it interpreted a 1973 amendment to the annuity statute (Pub. L. 93-136, 5 U.S.C. § 8340(c)(1)) -- providing that an annuity "shall not be less than the annuity which would have been payable if the commencing date of such annuity had been the effective date of the last preceding annuity increase"-- as requiring (and permitting) OPM to go back only to the last increase, if that would have led to a larger



annuity. In other words, OPM gave petitioner the annuity he would have received if he had retired immediately after the last increase (on March 1, 9th 1980) because that was larger than the annuity he would receive on his actual retirement date of September 1, 1980. 6th

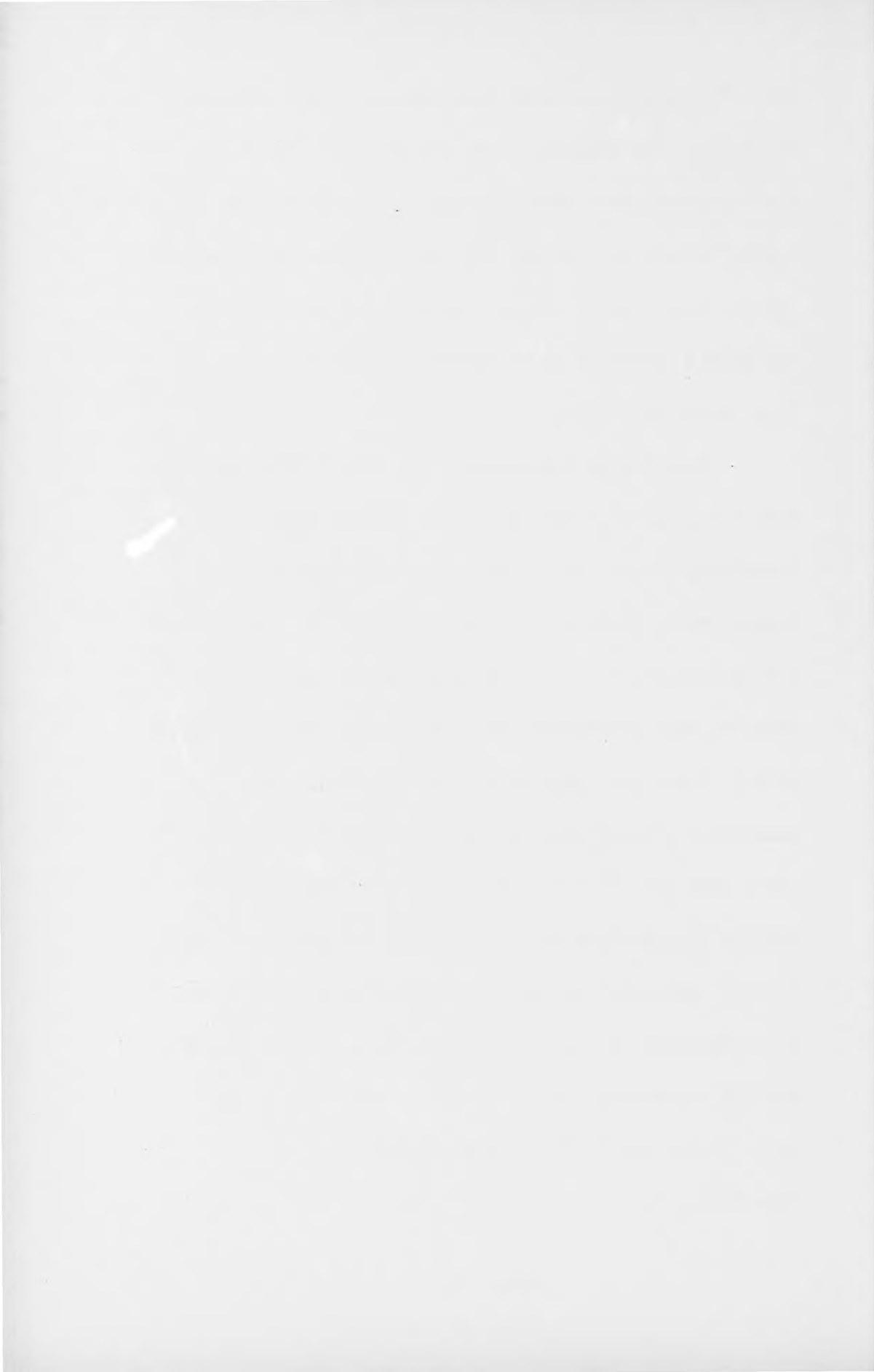
Petitioner's claim is that, under the 1973 amendment, OPM should have assumed that he had retired on the earlier date, March 1, 1980, and then 3rd gone back to the preceding increase of September 30, 1979. Under that cal- 2nd culation petitioner would be entitled, he says, to an additional \$264 per year. OPM rejected this claim, as did the presiding official of the MSPB on appeal. The full Board denied review (No. PH08318310151).

There is a dispute whether this court has any jurisdiction to review the Board's decision denying

Mr. McLaughlin the increased retirement annuity he seeks. We need not, and do not, consider that legal question in this case because, even if we assume *arguendo* that the court does have jurisdiction, we must affirm the MSPB's decision on its merits.

The bare language of the 1973 amendment is quite consistent with OPM's reading that only one "look back" was required, not a series of, or a continuum of successive, "look backs." Moreover, the clear purpose of Congress was to make sure that an employee would not get smaller retirement pay than if he had retired at the date of the immediately prior increase -- and that objective was fully satisfied by OPM's interpretation. Petitioner's reading, on the other hand, would open up the "look backs" all the way back to 1973, and allow the

84-904



particular retiree to choose the best combination for himself. OPM could properly reject that strained understanding of the 1973 amendment. It is clear that Congress has been aware of the OPM interpretation, and no change has been made. In sum, the MSPB was justified in refusing to overturn the construction given by OPM, the administering agency, to the statute.

84-904

Petitioner's Note

The handwritten notations at the end of lines in Appendix B are petitioner's notations to show the order of the lines from the bottom of page 2 in the original Opinion. See Appendix C for Court of Appeals' corrections to those lines.



Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

United States Court of Appeals
for the Federal Circuit

CHARLES F. McLAUGHLIN,)	
Petitioner,)	Appeal No.
v.)	84-904
OFFICE OF PERSONNEL)	
MANAGEMENT,)	ON PETITION
Respondent.)	FOR REHEARING

Before DAVIS, Circuit Judge, SKELTON,
Senior Circuit Judge, and MILLER,
Circuit Judge.

O R D E R

The court having considered the
submissions of the parties,

IT IS ORDERED THAT:

(1) The petition for rehearing is
denied.

(2) The opinion issued June 1, 1984
is modified to read as follows:

(a) Page 2 -- 9th line from the



bottom -- substitute "before" for "after".

Page 2 -- 6th line from the
bottom -- substitute "August 31, 1980"
for "September 1, 1980".

Page 2 -- 3rd line from the
bottom -- substitute "February 29, 1980"
for "March 1, 1980".

Page 2 -- 2nd line from the
bottom -- substitute "September 1, 1979"
for "September 30, 1979".

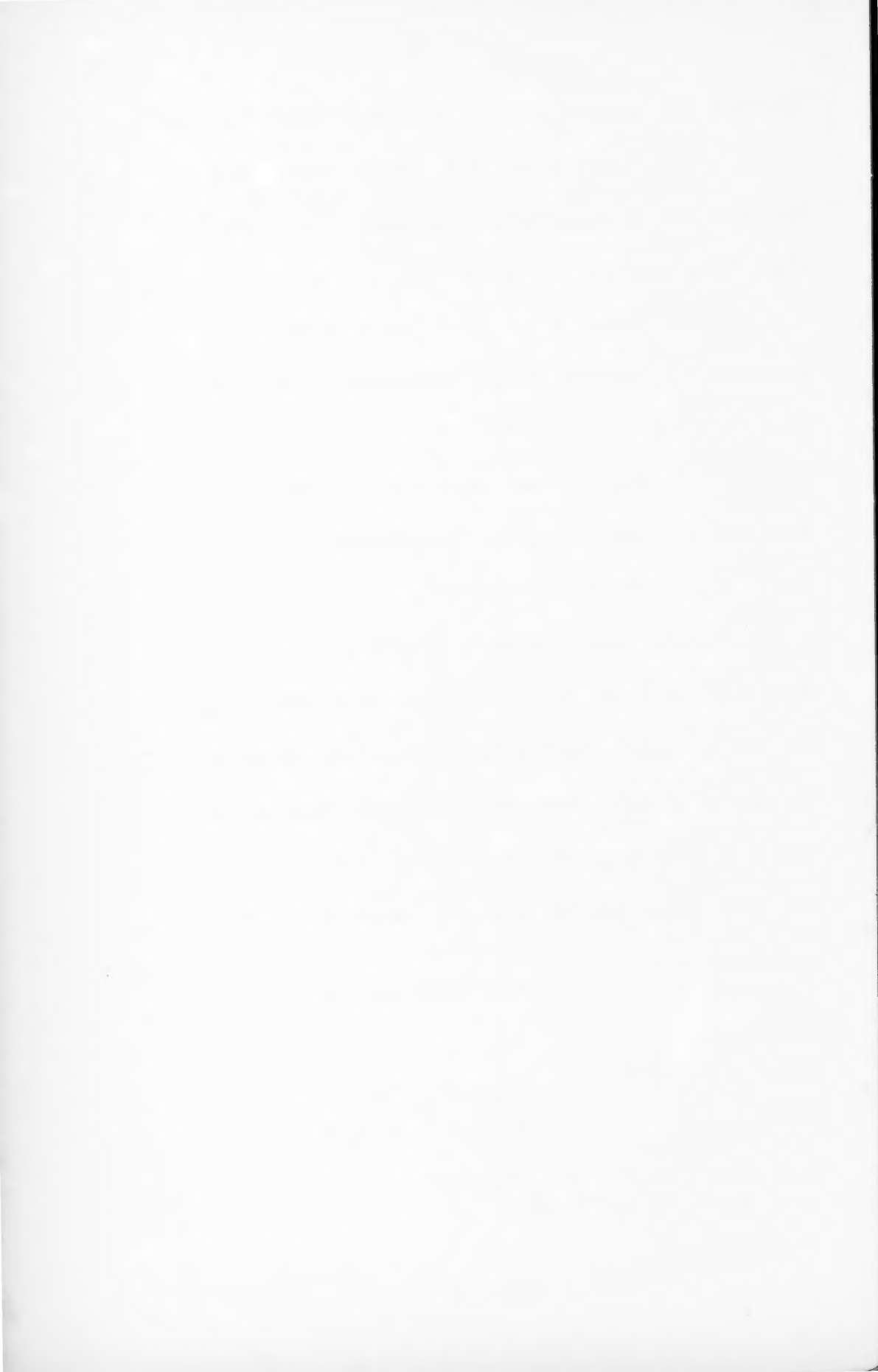
These inadvertent errors in dates
did not and do not affect the decision
in this case, and are corrected simply
to make clear the fundamental basis for
this court's opinion, which is stated
in the last paragraph on page 3 of the
opinion.

FOR THE COURT

July 26, 1984
Date

Oscar H. Davis
Circuit Judge

cc: Charles F. McLaughlin
Mary Mitchelson



UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
PHILADELPHIA REGIONAL OFFICE

CHARLES F. MC LAUGHLIN

v.

OFFICE OF PERSONNEL MANAGEMENT

Initial Decision No.: PH08318310151

Date: 15 JUN 1983

INTRODUCTION

This is an appeal from the decision of the Office of Personnel Management (OPM) denying appellant's request to upwardly adjust his retirement annuity. Appellant expressly waived a hearing in this matter and the record closed on all issues on March 28, 1983.

JURISDICTION

Under 5 U.S.C. § 7701(a), an individual may appeal to the Merit Systems Protection Board from any action made appealable to the Board under any law, rule or regulations. Both the law, 5 U.S.C. § 8347(d), and OPM regulations,

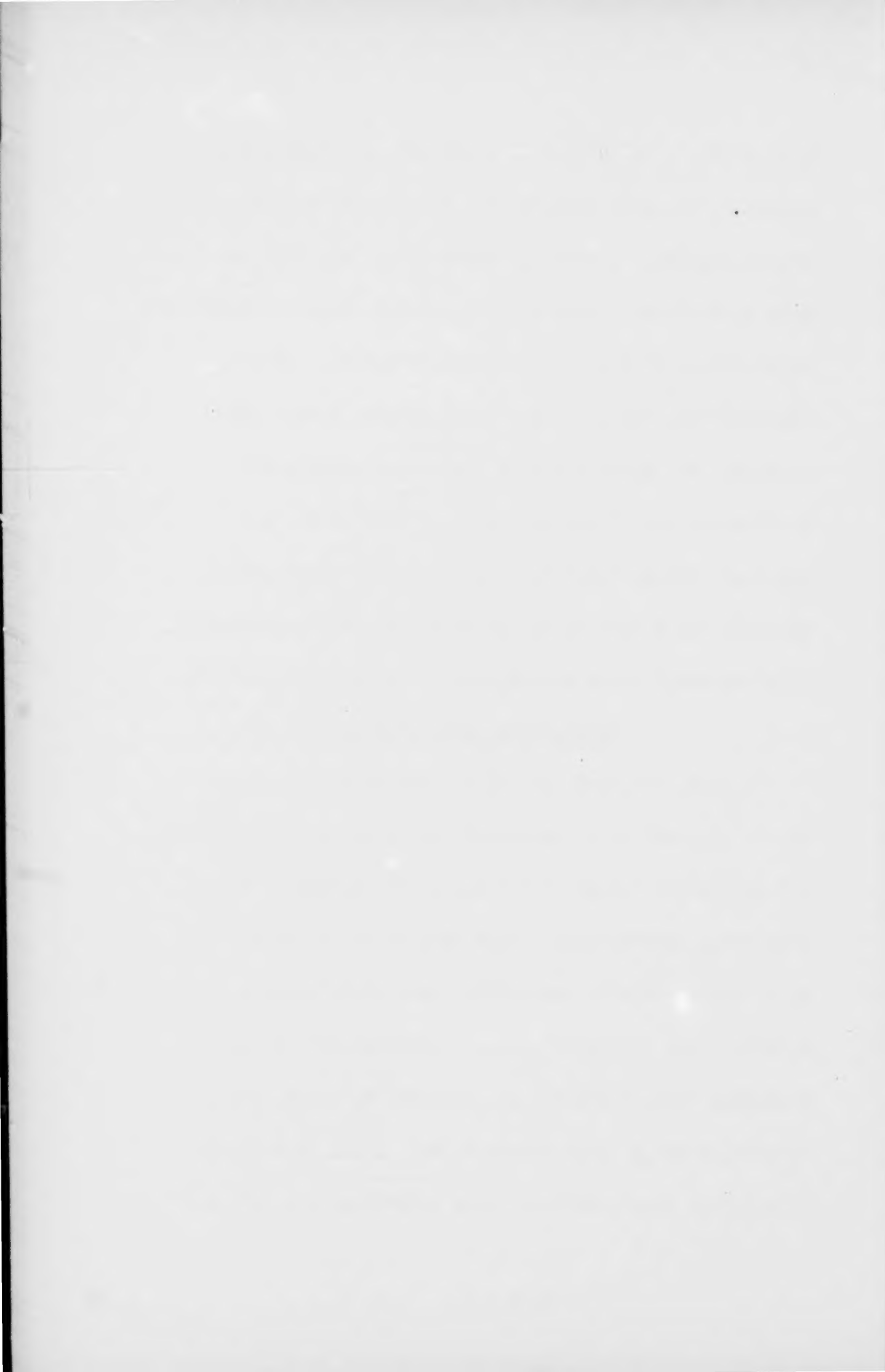
App. D



5 C.F.R. § 831.110, grant a right of appeal to the Board to any individual challenging a final decision by OPM on any question concerning that individual's retirement rights or interests. The record in this case indicates that OPM issued an appealable reconsideration decision on October 19, 1982 when it denied appellant's request to upwardly adjust his annuity payments. Accordingly, the appeal was accepted for adjudication.

ANALYSIS AND FINDINGS

The record in this case indicates that appellant retired on August 31, 1980 after more than 40 years of creditable federal service. The effective date of his retirement annuity was September 1, 1980. In this appeal, appellant challenges the method selected by OPM for calculating the amount of that annuity, arguing that under the provisions of a



1973 1/ amendment to the annuity statute, 5 U.S.C. § 8340, he should be receiving \$264 per year more than OPM has allotted him. The 1973 amendment, contained in Pub. L. 93-136 (October 24, 1973), states in pertinent part that a retirement annuity "shall not be less than the annuity which would have been payable if the commencing date of such annuity had been the effective date of the last preceding annuity increase" OPM and appellant agree that under this

1/ There have been several subsequent amendments to 5 U.S.C. § 8340. The 1980 amendment, Pub. L. 96-499 (December 5, 1980), became effective January 19, 1981, several months after appellant began receiving annuity benefits. Although this amendment somewhat altered the statutory language quoted above re annuity calculations, it specifically limited its own application to annuities commencing after the effective date of the amendment, Pub. L. 96-499, § 401(b)(1) and (2), and thus does not affect appellant..

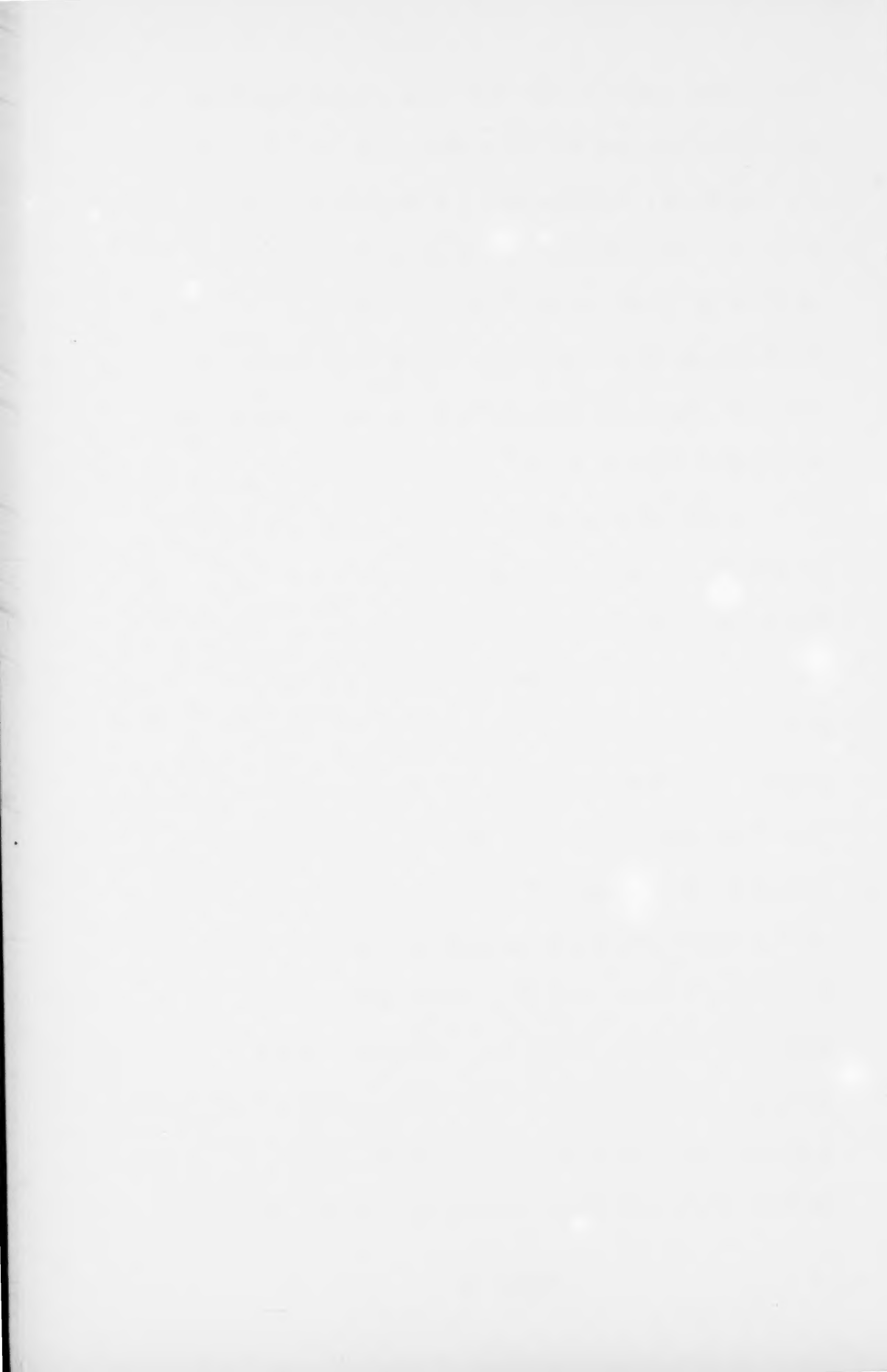
amendment two of the relevant dates are September 1, 1980 (the day on which appellant's annuity began) and March 1, 1980 (the effective date of the then last preceeding annuity increase).

Both parties also agree that Pub. L. 93-136 requires OPM to compare the annuity appellant would receive on his actual retirement date (September 1, 1980) to the annuity he would have received had he retired immediately before the last annuity increase (March 1, 1980), and to award him the larger of the two amounts. OPM insists that they have done this. Appellant argues, however, that to properly carry out the intent of Pub. L. 93-136, OPM must compare the annuity he would have received on March 1, 1980 with the annuity he would have received had he retired on September 1, 1979, the effective date of the annuity increase that preceeded the March, 1980 increase,

and award him the larger of the two amounts. Simply stated, appellant is arguing that Pub. L. 93-136 allows him to choose between two retirement dates, and that by electing the earlier date, March 1, 1980, his annuity rights must be calculated in all respects as if he retired on that date. Thus, had he retired on that date, Pub. L. 93-136 would still apply and he would be allowed to choose between the actual date of retirement (now March 1, 1980) and the effective date of the annuity increase that preceded that date (September 30, 1979). He argues that due to the high annuity increases awarded in 1979, his annuity would have been greater with a September, 1979 retirement date than it was with a September, 1980 retirement date, despite the additional years of federal service. Appellant insists that this anomaly is exactly what Pub. L. 93-136 intended to eliminate, and

that the spirit of the law requires his interpretation of his choices to control. In essence, appellant is arguing that Pub. L. 93-136 allows him a "look back within a look back," while OPM is insisting that the law does not require triple annuity comparisons, but mandates only one "look back" calculation.

Some discussion of the legislative history of the 1973 amendment is necessary to understand the issues involved in this appeal. The purpose of P. L. 93-136, as expressed in both the House and Senate Reports that accompanied the legislation, was to "liberalize eligibility for cost of living increases in civil service retirement annuities," see H.R. Rep. No. 93-457, 93rd Cong. 1st Session and S. Rep. No. 93-456, 93rd Cong., 1st Session. As explained in an August 22, 1973 letter signed by Elmer Staats, then Comptroller of the



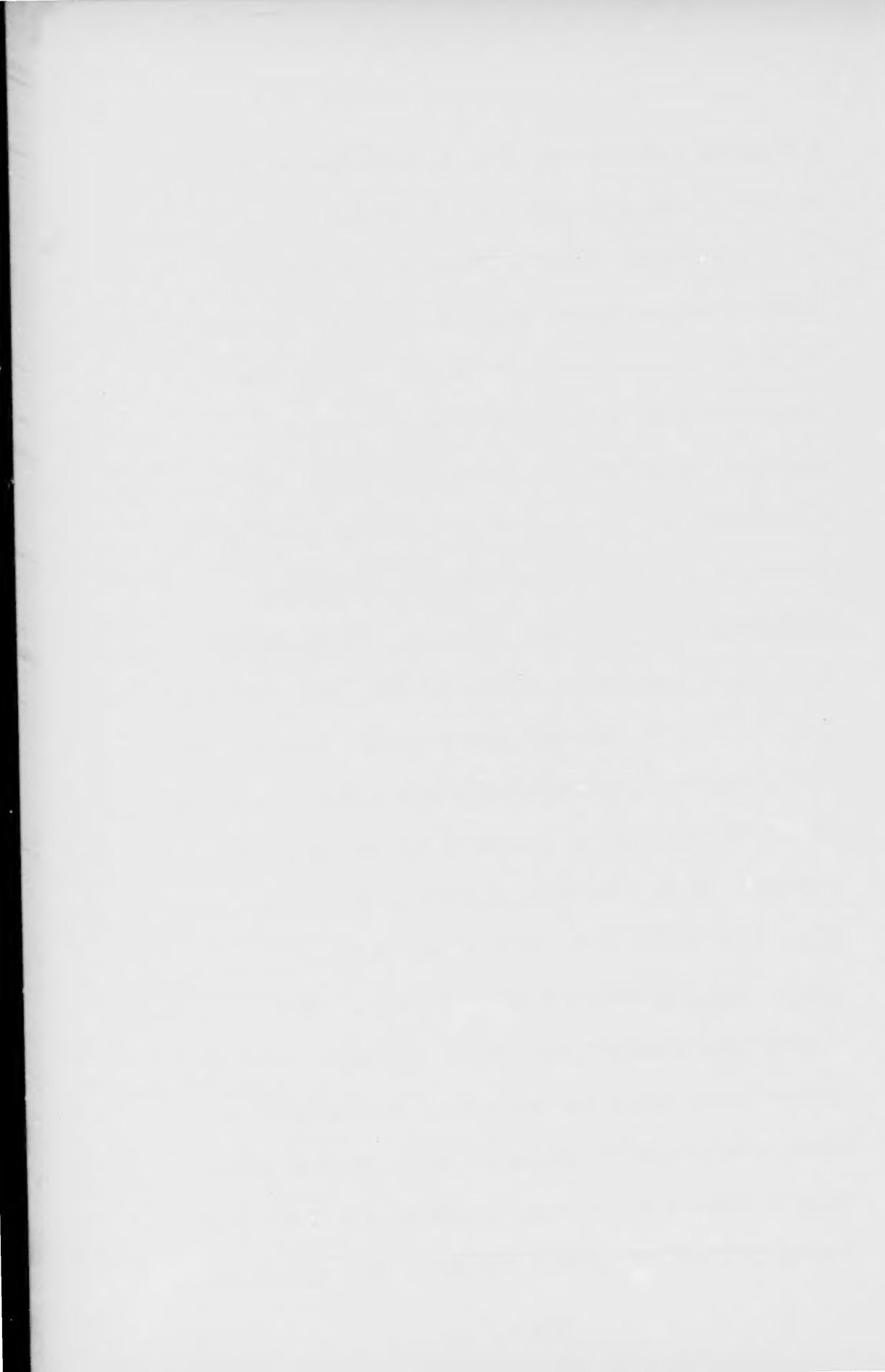
United States, to Senator Gale W. McGee, then Chairman of the Committee on Post Office and Civil Service, the amendment was designed to eliminate the rush to retirement that historically preceeded each announced cost of living adjustment (hereinafter COLA) to annuity payments, and to assure that employees who retired several months after each COLA were given the benefits of that COLA so that they did not receive a lower annuity, despite longer service, than those employees who retired on the eve of the previously announced COLA increase. A similar letter was addressed to Congressman Carl Albert, Speaker of the House of Representatives, on January 18, 1973 by Robert Hampton, then Chairman of the Civil Service Commission. He, too, concentrated on the need to eliminate the anomaly of an employee with longer service receiving a lesser annuity than



one who retired on the eve of the last preceeding COLA. He also pointed out that the semi-annual rush to qualify for a COLA caused disruption to the work force, large numbers of simultaneous retirements, and "bunches" in the retirement rolls. Mr. Hampton strongly recommended the passage of the amendment . These letters are appended to the House and Senate Reports prepared on the amendment, id. and their recommendations were followed by Congress when it enacted Pub. L. 93-136. And, of course, these Senate and House reports and their attachments are important tools in trying to determine both the preenactment history of a statute and the objective the new law was supposed to achieve, see Sands, Sutherland Statutory Construction, § 48.03 (4th Ed. 1973). Additionally, such reports and letters are relevant and carry

probative force on the questions at issue in this appeal, id. at § 48.02

Further, courts have historically acknowledged that they should be "guided by the 'venerable principle' that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 US 94, 121 (1973). And, a court "should give great weight to the frequent, consistent and long standing construction of a statute by an agency charged with its administration, Young v. TVA, 606 F.2d 143, 145 (6th Cir. 1979), cert. denied 445 US 942 (1980). The Board has recognized this concept, and has determined that in areas in which OPM has been statutorily charged with administering a law, its interpretation of that law is entitled to great weight, see Ruzek v.

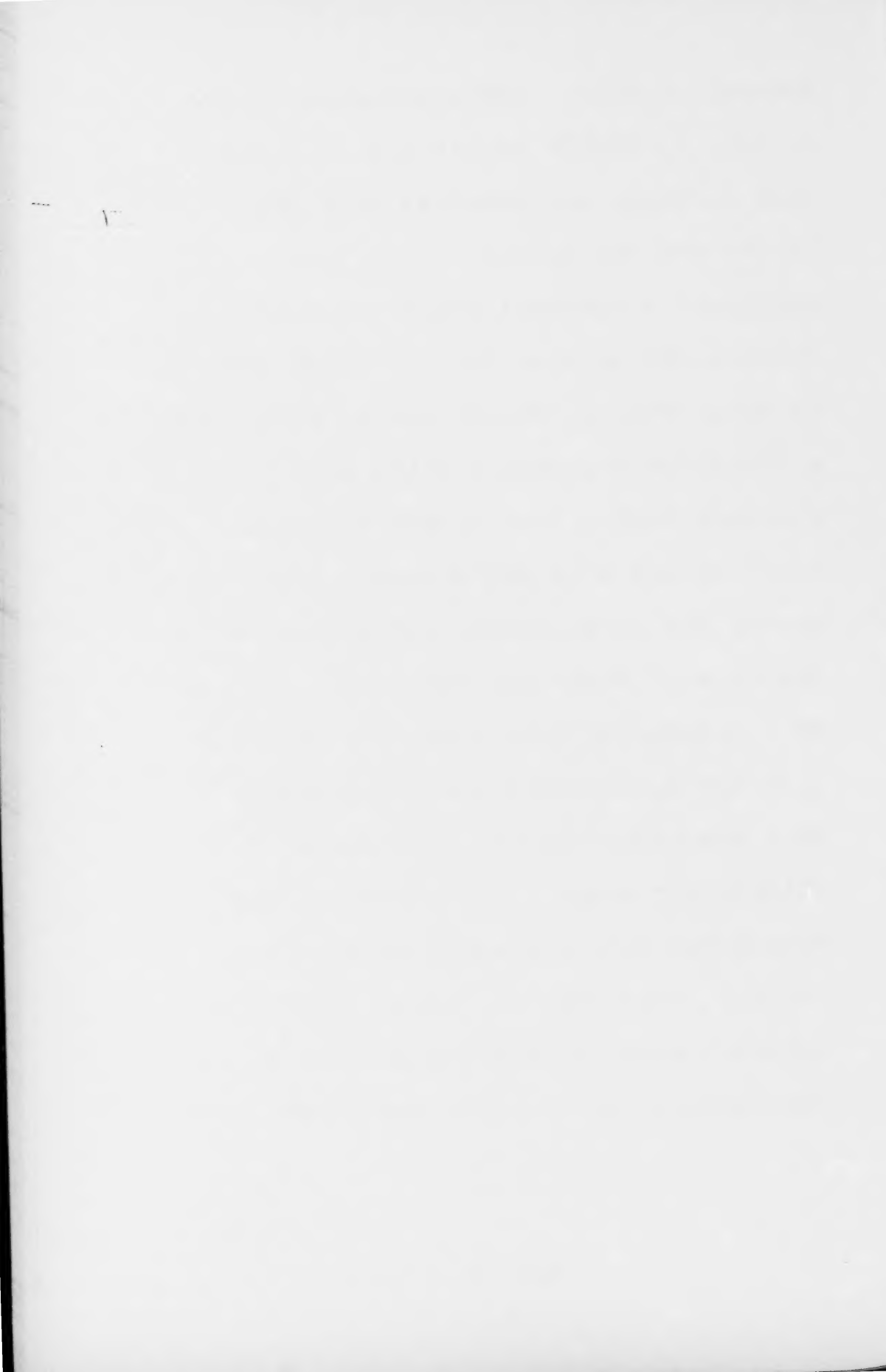


General Services Administration, 7 MSPB 307, 311 (1981). Thus, OPM's interpretation of Pub. L. 93-136 as requiring only one "look back" must be considered persuasive unless it is "clearly wrong." In my view, OPM's interpretation is correct, and must be sustained.

The plain language of Pub. L. 93-136 indicates that it is concerned only with comparing two dates - an employee's actual retirement date to the last preceeding COLA qualifying date. The legislative history of the law confirms that Congress wanted to eliminate the six month retirement bulges that occurred as retirees rushed to qualify for an impending COLA, and to equalize the benefits of all who retired during the 6 months that the COLA was in effect. In this manner, retirees would not suffer any financial loss for their several months of additional, post-COLA



federal service. OPM's interpretation of Pub. L. 93-136 completely fulfills that purpose, and embodies both the letter and the spirit of the law. Appellant's argument would actually require OPM to view the 1973-1980 period in which Pub. L. 93-136 was in effect as a continuum that would allow all retirees during that period to "look back" to any COLA commencement date during the seven years, and choose as the date of their own retirement the COLA commencing date that would qualify them for the largest annuity payment. This was obviously not Congress's intent, nor would it be a logical and reasonable interpretation of the law. For all these reasons, appellant's argument must be rejected and OPM's reconsideration decision sustained.



DECISION

OPM's reconsideration decision is sustained.

NOTICE

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on 20 Jul 1983 unless a petition for review is filed with the Board or the Board reopens the case on its own motion.

Any party to this appeal, the Director of the Office of Personnel Management, or the Special Counsel may file a petition for review of this decision with the Merit Systems Protection Board. The petition for review must set forth specific objections to the initial decision, supported by references to applicable laws or regulation, and with specific reference to the record. The petition for review must be filed with the Secretary to the Merit Systems

Protection Board, Washington, D.C. 20419
no later than the date set forth above.

After providing an opportunity for response by other parties, the Board may grant a petition for review when it is established that:

- (1) New and material evidence is available that, despite due diligence, was not available when the record was closed; or
- (2) The decision of the Presiding Official is based on an erroneous interpretation of statute or regulation.

Pursuant to 5 U.S.C. § 7703(b)(1), the appellant has the right to seek judicial review of the Board's final decision on his appeal. A petition requesting such review must be filed with the United States Court of Appeals for the Federal Circuit no later than thirty

(30) days after appellant's receipt of
the Board's final decision or order.

For the Board:

Suanne S. Strauss
Presiding Official

CERTIFICATE OF SERVICE

I hereby certify that a copy of
the foregoing Decision was sent by reg-
ular mail this date to the following:

Charles F. McLaughlin
622 E. Allegheny Avenue
Philadelphia, PA 19134

Craig B. Pettibone
Assistant Director for Pay
and Benefits policy
Compensation Group
Office of Personnel Management
P.O. Box 16
Washington, DC 20044

Office of Personnel Management
Attn: Appellate Policies Branch
1900 E Street, N.W., Rm. 7P568
Washington, DC 20415

Jacqueline R. Bradley
Assistant Managing Director
for Regional Operations
Merit Systems Protection Board
1120 Vermont Avenue, N.W.
Washington, DC 20419

Office of the Secretary
Merit Systems Protection Board
1120 Vermont Avenue, N.W.
Washington, DC 20419

Office of the Special Counsel
Philadelphia Field Office
Mall Building, Rm. 505
325 Chestnut Street
Philadelphia, PA 19106

15 JUN 1983

DATE

NAME

MSPB, U.S. Customhouse, Rm. 501
2nd & Chestnut Sts., Phila., PA 19106

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CHARLES McLAUGHLIN

v.

OFFICE OF PERSONNEL
MANAGEMENT

DOCKET NUMBER
PH08318310151

ORDER

Having fully considered the appellant's petition for review of the initial decision issued on June 15, 1983, and finding that it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, the Board hereby DENIES the petition.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. § 1201.113(b).

The appellant is hereby notified of the right under 5 U.S.C. § 7703 to

seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

JAN 10 1984
(Date)

Robert E. Taylor
Secretary

Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing ORDER was sent by certified mail this date to:

Charles F. McLaughlin
622 E. Allegheny Ave.
Philadelphia, Pennsylvania 19134

By regular mail service to:



Craig B. Pettibone
Assistant Director
Pay and Benefit Policy
Office of Personnel Management
P.O. Box 16
Washington, D.C. 20044

Office of Personnel Management
Attn: Appellate Policies Branch
Room 7F56B
Washington, D.C. 20415

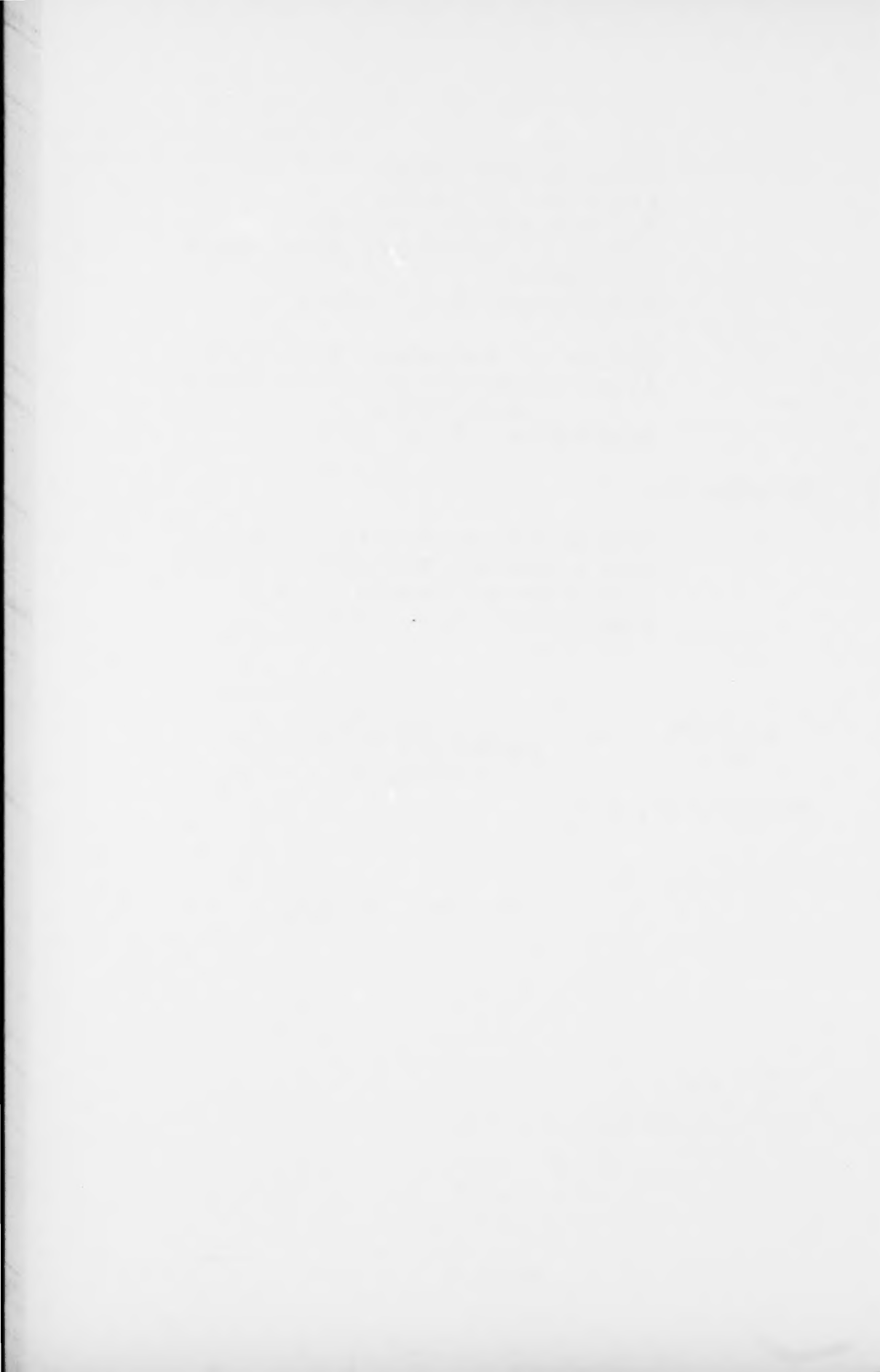
By hand to:

Office of the Special Counsel
Merit Systems Protection Board
1120 Vermont Avenue, N.W.
Washington, D.C. 20419

<u>1-12-84</u>	<u>Pat Paige</u>
(Date)	for Robert E. Taylor
	Secretary

Washington, D.C.

CTF. No 441152



R E V I S E D

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CHARLES F. McLAUGHLIN, No. 84-904

Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

JUDGMENT

ON APPEAL from the Merit Systems Pro-
tection Board

This CAUSE having been heard and
considered, it is

ORDERED AND ADJUDGED: AFFIRMED.

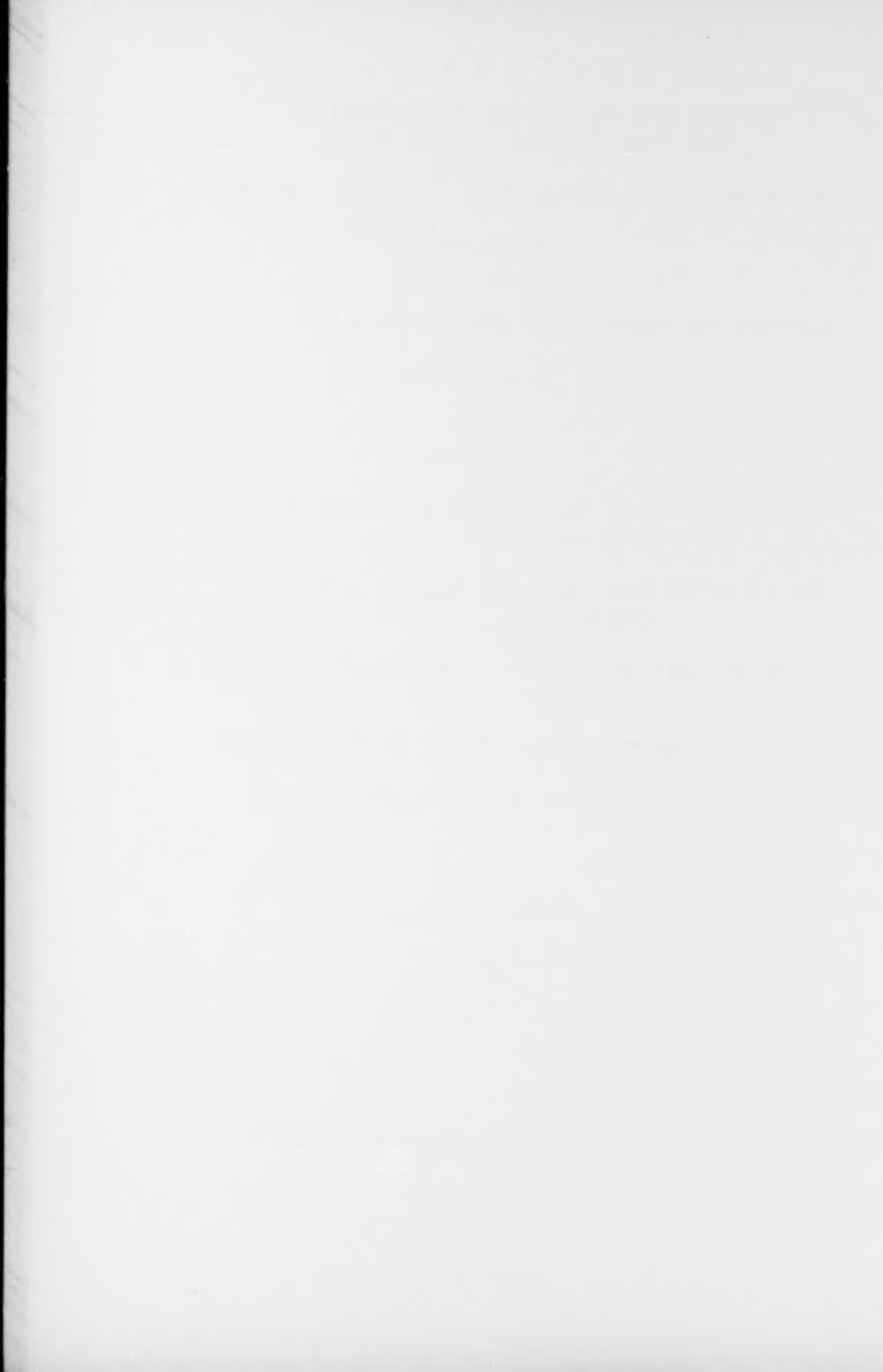
ENTERED BY ORDER OF THE COURT

George E. Hutchinson, Clerk

DATED June 1, 1984

Petition for Rehearing
Denied, July 26, 1984,
but the opinion is modified
to a certain extent.

ISSUED AS A MANDATE: August 9, 1984



Excerpts from Senate Report No. 93-456, 93rd Congress, 1st Session, the Senate Report that accompanied bill H.R. 3799, the bill that was enacted into Public Law 93-136.

EXCERPTS

...H.R. 3799 will correct an anomaly occasioned by the provisions of the present law, whereby an employee retiring after the effective date of a cost-of-living increase may receive a smaller annuity than an employee retiring just before the effective date of the increase, even though the former may have longer tenure or the same or higher high-three average salary. (Page 2)

The first section amends section 8340(c) of title 5, United States Code, to provide that an annuity of an employee or a Member that has a commencing date after the effective date of the last preceding cost-of-living increase under section



8340(b) of title 5, shall not be less than the annuity which would have been payable had the annuity commenced on the effective date of the last preceding cost-of-living increase. The employee or Member need not have been eligible for an annuity on the effective date of the last preceding cost-of-living increase in order to be entitled to the benefit under the amendment.

(Page 3)

Excerpts from House of Representatives
Report No. 93-457, 93rd Congress, 1st
Session, the House Report that
accompanied bill H.R. 3799, the bill
that was enacted into Public Law 93-136.

EXCERPTS

H.R. 3799 is based upon an official
recommendation of the U. S. Civil Service
Commission. (Page 1)

This legislation is designed to
(1) eliminate the anomaly of a difference
in amount between annuities that commence
on or before the effective date of a
cost-of-living annuity increase and those
that commence shortly after that date;
(2) moderate the peaking of retirements
immediately before cost-of-living in-
creases become effective; and (3) reduce
the disruption in the work of Government
agencies caused by many employees sudden-
ly retiring at the same time. (Page 2)



Under H.R. 3799, an employee retiring on or after the effective date of a cost-of-living increase, and the widow of an employee who dies on or after that date, will be guaranteed an annuity at least as large as would have been payable if the employee had retired or died the day before the effective date of the increase. The provisions apply to annuities which commence on or after July 2, 1973.

This will eliminate the anomaly of an employee who is separated for retirement soon after the effective date of an increase receiving a smaller annuity than an employee who retires before the effective date, even though the individual who retires after the effective date of the increase has as much or more service and the same or larger high-three average salary. It will also eliminate the parallel anomaly for widows. (Page 3)